PP

v.

TOH CHUN TOH GORDON & ANOR

SESSIONS COURT, KUALA LUMPUR
JAGJIT SINGH BANT SINGH SJ
[ARREST CASE NO: 62-(144-145)-2009]
29 FEBRUARY 2012

CRIMINAL PROCEDURE: *Sentencing - Criminal breach of trust - Directors of public-listed company fraudulently uplifted and squandered monies in company's fixed deposits - Whether defences raised were bare denials and afterthoughts - Whether premeditated plan by accused to siphon away company's funds required strong deterrent sentence - Whether plea of good character, old age, frail health, remorse and of being first offenders could mitigate sentence*

Multicode Electronics Industries (M) Bhd ('Multicode') was a public-listed company founded by PW1 and his brothers. Passing himself off as a Fund Manager, the first accused (Toh Chun Toh Gordon) sought to buy the 11.1m shares ('the shares') PW1 and his family members held in Multicode. The first accused proposed to make the purchase through the vehicle of another company ('APSB') which he claimed to represent. It was agreed that the full purchase price for the shares would be settled within three working days of the sale date. On the same day the shares were sold to the first accused through APSB, Multicode's Board of Directors ('BOD') met to formalise the resignation of PW1 as director of the company, the appointments of the first and the second accused (Dato Abul Hasan bin Mohamad Rashid) as directors and the first accused as Chief Executive Officer. Both accused were also made authorised signatories of Multicode's accounts which included its Fixed Deposits ('FDs'). The meeting did not hold any discussion about, or grant any approval for, the upliftment of the FDs. On the third day after the BOD meeting, the first accused received Multicode's FD certificates and on the same day both accused went to the banks concerned, uplifted the FDs which involved a sum of more than RM26m and transferred the monies to the accounts of third parties. This included a sum of RM18.1m which was transferred to the account of a company ('EGS') controlled solely by the first accused from which amount he used RM17.6m to fully settle the purchase price for the shares. Both the accused did not disclose in subsequent meetings of Multicode's BOD that the FDs had been uplifted and that the monies had been transferred to the accounts of third parties until queries were raised by the

company's external auditors several months later. When the fiasco was discovered, the first accused promised to have the funds returned to Multicode but it never happened. The first accused was charged in the Sessions Court with engaging in an act to defraud Multicode by uplifting the FDs and using part of the monies therefrom to purchase Multicode's own shares - an offence under s. 87A(b) of the Securities Industry Act 1983 ('SIA'). The second accused was charged with abetting him in the offence. Both accused were alternatively charged under s. 409 of the Penal Code for committing criminal breach of trust of the RM26m that belonged to Multicode while being directors of the company.

Held (sentencing first accused to 12 years' jail and a fine of RM1 million in default two years' jail and second accused to six years' jail):

(1) Both accused who were entrusted with, and had dominion over, Multicode's FDs amounting to RM26m, dishonestly misappropriated or converted the monies in the FDs by encashing them and crediting the monies into the accounts of third parties and using part of it to pay for the purchase of Multicode's shares within the T + 3 days. They concealed from the BOD the fact that the FDs had been uplifted and squandered. When the uplifting was exposed, the first accused even went to the extent of producing forged FDs to show the monies had been returned to Multicode but the monies were never returned. (paras 55, 59 & 64)

(2) The defence raised by both accused was one of bare denials, afterthought and recent fabrications. In particular, the first accused, who was the mastermind of this huge scandal, manufactured his evidence as he went along with his testimony. Both accused failed to raise any reasonable doubt. The prosecution had proved the s. 409 Penal Code offence against them beyond all reasonable doubt (paras. 113, 116 & 129)

(3) The white-collar scandal both accused had committed was of the highest order and was meticulously schemed and executed. It was premeditated and executed with precision within the T + 3 days. Multicode was a public-listed company and the crime committed by both accused not only affected the company but the confidence of investors and the public at large. As such the sentence imposed on the accused had to convey a strong message to offenders and would-be offenders that crime does not pay. (paras. 136, 125 & 137)

(4) Factors such as good character, old age, frail health, being first offenders and being remorseful and regretful of one's actions should not be strong mitigating factors and should therefore not be given serious consideration when imposing sentence. White collar criminals could not rely on the mitigating factor of good behaviour simply because had they been persons of bad character they would not have qualified to be placed in such positions of trust. (para 132)

Case(s) referred to:

Balachandran v. PP [2005] 1 CLJ 85 FC ***(refd)***
Chong Chiew Nam v. PP [1997] 1 LNS 34 HC ***(refd)***
Chris-Craft Industries Inc v. Piper Aircraft Corp [480 F 2d 341, Fed Sec L Rep (CCH) 93816, 25 ALR Fed 534] ***(refd)***
Gopalakrishnan Vanitha v. PP [1999] 4 SLR 307 ***(refd)***
Jaafar Ali v. PP [1999] 1 CLJ 410 HC ***(refd)***
Looi Kow Chai & Anor v. PP [2003] 1 CLJ 734 CA ***(refd)***
Mohamad Radhi Yaakob v. PP [1991] 3 CLJ 2073; [1991] 1 CLJ (Rep) 311 SC ***(refd)***
Mohd Haikal Mohd Khatib Saddaly & Ors v. PP [2011] 5 CLJ 369 CA ***(refd)***
Nagappan Kuppusamy v. PP [1988] 1 CLJ 283; [1988] 1 CLJ (Rep) 229 SC ***(refd)***
Perry Hooper v. Mountain States Securities Corp [282 F 2d 195] ***(refd)***
PJTV Denson (M) Sdn Bhd & Ors v. Roxy (Malaysia) Sdn Bhd [1980] 1 LNS 55 FC ***(refd)***
PP v. Datuk Haji Harun Hj Idris & Ors [1977] 1 LNS 92 HC ***(refd)***
PP v. Govindnan Chinden Nair [1998] 2 CLJ 370 HC ***(refd)***
PP v. Khairuddin Hj Musa [1981] CLJ 86; [1981] CLJ (Rep) 234 HC ***(refd)***
PP v. Ling Tee Huah [1980] 1 LNS 212 ***(refd)***
PP v. Loo Chang Hock [1988] 1 CLJ 76; [1988] 2 CLJ (Rep) 263 HC ***(refd)***
PP v. Mohamed Nor & Ors [1985] 1 LNS 25 SC ***(refd)***
PP v. Mohd Radzi Abu Bakar [2006] 1 CLJ 457 FC ***(refd)***
PP v. Ng Wu Hong & Ors (Criminal Appeal No. 42-08-2003-II) (Unreported) ***(refd)***
PP v. Tan Koon Swan [1986] 2 CLJ 379; [1986] CLJ (Rep) 841 HC ***(refd)***
PP v. Tan Tatt Eek & Other Appeals [2005] 1 CLJ 713 FC ***(refd)***
PP v. Yip Yee Foo & Chung Wai Meng [Kuala Lumpur Sessions Court Criminal Trial No 62-515 and 516–2004] (Unreported) ***(refd)***
R v. Adler [2005] NSWSC 274 ***(refd)***
Re Application of Tan Boon Liat @ Allen; Tan Boon Liat v. Menteri Hal Ehwal Dalam Negeri, Malaysia & Ors [1976] 1 LNS 126 HC ***(refd)***
Securities and Exchange Commission v. Texas Gulf Sulphur Co [401F 2d 833] ***(refd)***
Securities and Futures Commission v. Choi Wak Zai & Anor [2003] 1 HKC 30 ***(refd)***
Sivananda Mudali v. Emperor AIR 1926 Mad 1702 ***(refd)***
Shahril Yahya v. PP [2011] 1 CLJ 1034 HC ***(refd)***
Speed v. Transamerica Corp [99 f Supp 808 (D Del 1951)] ***(refd)***
Tan Liang Chew & Ors v. PP [1996] 1 LNS 118 HC ***(refd)***

Legislation referred to:
Criminal Procedure Code, s. 173(m)
Interpretation Acts 1948 and 1967, s. 3
Penal Code, ss. 23, 24, 107, 409B
Securities Industry Act 1983, s. 87A(b)

For the public prosecutor - Shanti Geoffrey; DPP (Nor Rifhan Raimi Rozi; PO & Farhan Read; DPP with her)
For the first accused - Kevin Joshua (Thivina with him); M/s Kevin & Co
For the second accused - Ng Aik Guan (Lai Jen Li with him); M/s Ng Aik Guan & Co

Reported by Ashok Kumar

JUDGMENT

Jagjit Singh Bant Singh SJ:

[1] A premeditated white collar scandal executed with precision within the T + 3 days is how I would sum up this case. The *modus operandi* was very simple. The accused, Toh Chun Toh Gordan (first accused), a Singaporean, having dual degrees in Engineering and Economics from Southern California Pacific University, having a Masters in Business Administration, a former Midland Bank Group Regional Executive Director of South East Asia, former Regional Manager of Amco Merchant Bank, former Senior Regional Manager of Lloyds Bank International, bought over 11.1 million shares in Multi-code Electronics Industries (M) Berhad ("Multicode") using Ace Prelude Sdn Bhd ("APSB") as the vehicle. He then got himself appointed as the Executive and Non Independent Director and the Chief Executive Officer (CEO) of Multicode and got the other accused, Dato' Abul Hasan bin Mohamad Rashid (second accused) together with two others as the directors of Multicode. Both the first and second accused were also appointed as the authorised signatories of the banking documents of Multicode. They then swiftly uplifted Multicode's fixed deposits ("FDs") in the tune of RM26 over million the very next working day without any mandate or approval of the Board of Directors of Multicode ("BOD") and used Multicode's monies to pay for Multicode's shares that the first accused purchased via APSB within the T + 3 days.

Charges

[2] The first accused was charged as follows:

> Amended Principal Charge
>
> That you, between 26 March 2007 and 28 March 2007, at Kenanga Investment Bank Berhad (Company No: 15678-H) (formerly known as K & N Kenanga Berhad), Level 2, Menara Pelangi, Jalan Kuning,

Taman Pelangi, 80400 Johor Bahru, in the state of Johor Darul Takzim, indirectly in connection with the purchase of securities namely 11.1 million units of Multi-code Electronics Industries (M) Berhad shares (hereinafter referred to as "the shares"), engaged in an act which operated as a fraud on Multi-code Electronics Industries (M) Berhad (Company No: 193094-K) by causing the uplifting of fixed deposits belonging to Multi-code Electronics Industries (M) Berhad (as per Appendix 1) amounting to RM18,146,168.74 out of which RM17,552,275.20 was subsequently paid to Kenanga Investment Bank Berhad (Company No. L 15678-H) banking account no. 0001-312100888613 at Standard Chartered Bank Berhad, No. 2, Jalan Ampang, Kuala Lumpur, for the purchase of the shares by Ace Prelude Sdn. Bhd. (Company No. L 734044-X) through trading account no. 3AC0027 with Kenanga Investment Bank Berhad (Company No: 15678-H) (formerly known as K & N Kenanga Berhad), and you have thereby committed an offence under section 87A(b) of the Securities Industry Act 1983 (Act 280) and punishable under section 88B of the same Act.

Alternative Charge

That you, between 23 March 2007 and 28 March 2007, at Multi-code Electronics Industries Sdn Bhd (Company No: 193094-K) Suite 11.2B, Level 11, Menara Pelangi, No. 2, Jalan Kuning, Taman Pelangi, 80400, Johor Bahru, in the state of Johor Darul Takzim, as an agent, namely a Director of Multi-code Electronics Industries (M) Berhad (Company No: 193094-K) and in such capacity entrusted with certain property (as per Appendix 2), amounting to RM26,045,473.94, had committed criminal breach of trust in respect of the said property, and you have thereby committed criminal breach of trust of the said property, an offence under section 409 of the Penal Code and punishable under the same section.

[3] The second accused was charged as follows:

Amended Principal Charge

That you, between 26 March 2007 and 28 March 2007, at Kenanga Investment Bank Berhad (Company No: 15678-H) (formerly known as K & N Kenanga Berhad), Level 2, Menara Pelangi, Jalan Kuning, Taman Pelangi, 80400 Johor Bahru, in the state of Johor Darul Takzim, indirectly in connection with the purchase of securities namely 11.1 million units of Multi-code electronics Industries (M) Berhad shares (hereinafter referred to as "the shares"), abetted Toh Chun Toh Gordon (Singapore Passport No: E0652347N) to engage in an act which operated as a fraud on Multi-code Electronics Industries (M) Berhad (Company No: 193094-K) by causing the uplifting of Fixed Deposits belonging to Multi-code Electronics Industries (M) Berhad (as per Appendix 1) amounting to RM18,146,168.74 out of which RM17,552,275.20 was subsequently paid to Kenanga Investment Bank Berhad (Company No: 15678-H), banking account no. 0001-312100888613 at Standard Chartered Bank

Berhad, No. 2, Jalan Ampang, Kuala Lumpur, for the purchase of the shares by Ace Prelude Sdn Bhd (Company No: 734044-X) through trading account no: 3AC0027 with Kenanga Investment Bank Berhad (formerly known as K & N Kenangan Berhad), which offence was committed as a result of your abetment and you have thereby committed an offence under Section 87A(b) read together with Section 122C(c) of the Securities Industry Act 1983 (Act 280) and punishable under section 122C of the same Act.

Alternative Charge

That you, between 23 March 2007 and 28 March 2007, at Multi-code Electronics Industries Sdn Bhd (Company No: 193094-K) Suite 11.2B, Level 11, Menara Pelangi, No. 2, Jalan Kuning, Taman Pelangi, 80400, Johor Bahru, in the state of Johor Darul Takzim, as an agent, namely a Director of Multi-code Electronics Industries (M) Berhad (Company No: 193094-K) and in such capacity entrusted with certain property (as per Appendix 2), amounting to RM26,045,473.94, had committed criminal breach of trust in respect of the said property, and you have thereby committed criminal breach of trust of the said property, an offence under section 409 of the Penal Code and punishable under the same section.

Appendix 1

No.	Bank	Fixed deposits	Total Upliftment
1.	RHB Bank Berhad	Account No. 3-01147-009413-9	RM504,958.91
2.	RHB Bank Berhad	Account No. 3-01147-009412-0	RM504,958.91
3.	RHB Bank Berhad	Account No. 3-01147-006780-8	RM500,000.00
4.	RHB Bank Berhad	Account No. 3-01147-006776-0	RM500,000.00
5.	RHB Bank Berhad	Account No. 3-01147-006778-6	RM500,000.00
6.	RHB Bank Berhad	Account No. 3-01147-006779-4	RM500,000.00
7.	RHB Bank Berhad	Account No. 3-01147-007518-5	RM500,000.00
8.	RHB Bank Berhad	Account No. 3-01147-007651-3	RM500,000.00
9.	RHB Bank Berhad	Account No. 3-01147-007519-3	RM500,000.00
10.	RHB Bank Berhad	Account No. 3-01147-007650-5	RM500,000.00

11.	Public Bank Berhad	S/N.I 636397	RM506,657.53
12.	Public Bank Berhad	S/N.I 636394	RM506,657.53
13.	Public Bank Berhad	S/N.I 636396	RM506,657.53
14.	Public Bank Berhad	S/N.I 636356	RM500,000.00
15.	Public Bank Berhad	S/N.I 366255	RM504,463.00
16.	Public Bank Berhad	S/N.I 636355	RM500,000.00
17.	Public Bank Berhad	S/N.I 366254	RM504,463.00
18.	Public Bank Berhad	S/N.I 636395	RM506,657.53
19.	Bank Kerjasama Rakyat (M) Berhad	No. Sijil 10305651	RM505,684.38
20.	Bank Kerjasama Rakyat (M) Berhad	No. Sijil 10305652	RM505,684.38
21.	Bank Kerjasama Rakyat (M) Berhad	No. Sijil 10305649	RM505,684.38
22.	Bank Kerjasama Rakyat (M) Berhad	No. Sijil 10305650	RM505,684.38
23.	Bank Kerjasama Rakyat (M) Berhad	No. Sijil 10305520	RM512,992.88
24.	Bank Kerjasama Rakyat (M) Berhad	No. Sijil 10305521	RM512,992.88
25.	Bank Kerjasama Rakyat (M) Berhad	No. Sijil 10305518	RM512,992.88
26.	Bank Kerjasama Rakyat (M) Berhad	No. Sijil 10305519	RM512,992.88
27.	Bank Kerjasama Rakyat (M) Berhad	No. Sijil 10305516	RM512,992.88
28.	Bank Kerjasama Rakyat (M) Berhad	No. Sijil 10305517	RM512,992.88
29.	Bank Kerjasama Rakyat (M) Berhad	No. Sijil 10218401	RM500,000.00
30.	Bank Kerjasama Rakyat (M) Berhad	No. Sijil 10218402	RM500,000.00

A Appendix 2

No.	Bank	Fixed Deposit	Total Upliftment
1.	RHB Bank Berhad	Account No. 3-01147-009413-9	RM504,958.91
2.	RHB Bank Berhad	Account No. 3-01147-009412-0	RM504,958.91
3.	RHB Bank Berhad	Account No. 3-01147-006780-8	RM500,000.00
4.	RHB Bank Berhad	Account No. 3-01147-006776-0	RM500,000.00
5.	RHB Bank Berhad	Account No. 3-01147-006778-6	RM500,000.00
6.	RHB Bank Berhad	Account No. 3-01147-006779-4	RM500,000.00
7.	RHB Bank Berhad	Account No. 3-01147-007518-5	RM500,000.00
8.	RHB Bank Berhad	Account No. 3-01147-007651-3	RM500,000.00
9.	RHB Bank Berhad	Account No. 3-01147-007519-3	RM500,000.00
10.	RHB Bank Berhad	Account No. 3-01147-007650-5	RM500,000.00
11.	Public Bank Berhad	S/N.I 636397	RM506,657.53
12.	Public Bank Berhad	S/N.I 636394	RM506,657.53
13.	Public Bank Berhad	S/N.I 636396	RM506,657.53
14.	Public Bank Berhad	S/N.I 636356	RM500,000.00
15.	Public Bank Berhad	S/N.I 366255	RM504,463.00
16.	Public Bank Berhad	S/N.I 636355	RM500,000.00
17.	Public Bank Berhad	S/N.I 366254	RM504,463.00
18.	Public Bank Berhad	S/N.I 636395	RM506,657.53
19.	Malayan Banking Berhad	Account No. 501299506866	RM9,000,000.00
20.	Malayan Banking Berhad	Account No. 501299506866	RM2,000,000.00
21.	Malayan Banking Berhad	Account No. 501299506866	RM6,000,000.00
TOTAL			RM26,045,473.94

B C D E F G H I

[4] Both the first and second accused (both the accused) were tried jointly. A

[5] The prosecution called 31 witnesses and adduced 83 documentary exhibits to prove the charges against both the accused. The evidence disclosed by the prosecution very briefly is as follows: B

(a) Multicode is a public listed company since 1997. Goh Tong Huat, ("PW1") together with his two brothers, Goh Chai Siong and Goh See Chuan were the main promoters and the brains of the company. Since listing, PW1 has been the Managing Director of Multicode. PW1 together with his wife owned 28.4% shareholdings C in Multicode;

(b) towards the end of February or early March a lunch meeting took place at the Zone Hotel in Johor Bahru where PW1, Dr Goh Kar Choon ("PW6"), Nora Lam ("PW2"), Woo Chee Leong, the first accused and one Daniel Wong were present. During the meeting D PW1 was informed by the first accused that he was a fund manager and had parked his money in Malaysia and is interested to buy PW1's shares in Multicode. PW1 was also informed that the first accused will use APSB as the vehicle to buy the shares and that the first accused is a representative of APSB; E

(c) on 23 March 2007, PW1 sold his and his family members' shareholdings in Multicode amounting to 11.1 million shares to the first accused through APSB;

(d) immediately after the share transaction was transacted on 23 March F 2007, Multicode's BOD's meeting was convened wherein PW1 resigned as a director of Multicode and the first accused was appointed as a director and the CEO of Multicode. In the same meeting the second accused was appointed as the director of Multicode. Both the accused were also made the authorised G signatories of Multicode's accounts which included the fixed deposits (FDs);

(e) what is most pertinent to note of 23 March 2007 BOD's meeting is that no approval was sought or obtained to uplift the FDs nor H was there any discussion held pertaining to the upliftment of the FDs;

(f) on 26 March 2007, PW1 handed over Multicode's FDs certificates to the first accused in the presence of the second accused, PW6 and Ang Ai Ling ("PW4"); I

A (g) on the same day immediately after the handover, both the accused together with Winnie Tee Keng See ("PW5") went to the Public Bank, RHB Bank, Maybank and Affin Bank and the Multicode FDs were uplifted and transferred to third parties accounts;

B (h) the FDs in Public Bank, RHB Bank and Bank Rakyat were uplifted and transferred to Elliot Gordon Singapore Pte Ltd ("EGS") account which was maintained at Ambank, Kuala Lumpur. The total sum that was transferred to EGS was RM18,146,168.74;

(i) the first accused was the sole authorised signatory of the EGS C account;

(j) after the transfer of RM18,146,168.74 to EGS account, upon the instruction and authorisation of the first accused a sum of RM17,552,275.20 was transferred to Kenanga Investment Bank Berhad's (formerly known as K & N Kenanga Berhad) D ("Kenanga") account at Standard Chartered, Kuala Lumpur on 27 March 2007. This transfer of RM17,552,275.20 was made to Kenanga for the purpose of settling the payment for the purchase of 11.1 million shares sold by PW1 and his family members to the first accused via APSB;

E

(k) the sale and purchase of the shares was done *via* Direct Business Transaction ("DBT") whereby the day the transaction was transacted was on 23 March 2007 (Friday), also known as the 'T' day. The payment for the share transaction was required to be F made to PW1 on a T + 3 days that is the transaction day plus three working days. Since the transaction date was 23 March 2007 (Friday) payment must be settled by the 28 March 2007 (Wednesday);

(l) the sum of RM17,552,275.20 that was transferred from EGS to G Kenanga was then used to pay PW1 and his family for the settlement of the shares transaction. Kenanga had, on 28 March 2007 issued payment to PW1 and his family members for the sale of the 11.1 million shares; and

H (m) it must be noted that in the subsequent BOD's meetings including the BOD's meeting held on 29 March 2007 both the accused did not inform the BOD that they had uplifted the FDs from Multicode's account and had transferred the monies to third parties' account.

I

Prima Facie Case

[6] The burden of proof on the prosecution at the end of prosecution's case is to make out a *prima facie* case as illustrated in *Balachandran v. PP* [2005] 1 CLJ 85, at p. 100 where the Federal Court held that:

> ...at the close of the case for the prosecution, undertake a positive evaluation of the credibility and reliability of all the evidence adduced so as to determine whether the elements of the offence have been established... thus if the accused remains silent he must be convicted.

[7] In the case of *Mohd Haikal Mohd Khatib Saddaly & Ors v. PP* [2011] 5 CLJ 369, the Court of Appeal held:

At the close of the prosecution's case, the trial judge must scrutinise the evidence adduced by the prosecution on a maximum evaluation basis - the required standard, and then to ask himself one very pertinent question: Can I convict him if he elects to remain silent after the defence has been called based entirely on the evidence led by the prosecution? If the answer is in the positive, a *prima facie* case has been made out and the accused has to be convicted. If the answer is in the negative, then no *prima facie* case has been made out and the accused is entitled to be acquitted.

The Offences

[8] Both the accused are charged for an offence under s. 87A(b) of the Securities Industry Act 1983 ("SIA") and they also faced the alternative charge for an offence under s. 409 of the Penal Code.

Offence Under s. 87A(b) Of The SIA

[9] Section 87A of the SIA reads:

> Use of manipulative and deceptive devices
>
> 87A. Subject to section 87B, it shall be unlawful for any person directly or indirectly in connection with the purchase or sale of any securities -
>
> (a) to use any device, scheme or artifice to defraud;
>
> (b) to engage in any act, practice or course of business which operates or would operate as a fraud or deceit upon any person; or
>
> (c) to make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made in the light of the circumstances under which they were made, not misleading.

[10] The word 'securities' under the SIA has the same meaning as provided under the Securities Commission Act 1993 (Act 498) and reads as follows:

> "securities" means
>
> (a) debentures, stocks or bonds issued or proposed to be issued by any government;
>
> (b) shares in or debentures of, a body corporate or an unincorporated body; or
>
> (c) unit trusts or prescribed investments,
>
> ...

The 11.1 million units of shares in Multicode would obviously fall within the definition of "securities".

[11] For the offence under s. 87A(b) the prosecution will have to prove the following ingredients:

(a) both the accused had caused the uplifting of FDs belonging to Multicode amounting to RM18,146,168.74;

(b) RM17,552,275.20 was subsequently paid to Kenanga indirectly in connection with the purchase of securities namely, 11.1 million Multicode's shares, by the first accused *via* APSB;

(c) both the accused had engaged in an act which operated as a fraud on Multicode; and

(d) the second accused abetted the first accused in the commission of the offence.

Preliminary Issue

[12] The learned counsel for the second accused raised a preliminary issue of law after defence was called, that s. 87A of SIA is inapplicable where the alleged victim is the issuer of the securities or shares in question. The learned defence counsel relied on the case of *PP v. Yip Yee Foo* & *Chung Wai Meng* (Kuala Lumpur Sessions Court Criminal Trials No. 62-515 and 516-2004) where the learned Sessions Court Judge *inter alia* referring to the US case of *Securities and Exchange Commission v. Texas Gulf Sulphur Co* (401F 2d 833), took the view that s. 87A is inapplicable where the alleged victim is a company as well as the issuer of the securities or shares in question. Accordingly the learned defence counsel submitted that the second accused should be acquitted of the principal charge since the victim in this case is Multicode and is

also the issuer of the 11.1 million shares in question. The learned counsel for the first accused adopted the submissions of the learned counsel of the second accused for the benefit of the first accused.

[13] The learned Deputy Public Prosecutor ("DPP") submitted that this argument should be dismissed on the following reasons:

(a) the High Court decision in *PP v. Ng Wu Hong and Ors* (Criminal Appeal No. 42-08-2003-II) (unreported) has clearly decided that s. 87A accords protection to a broad range of market participants, not only the investing public and that the section should be given its literal interpretation;

(b) the decision of the Sessions Court in the case of *PP v. Yip Yee Foo* is wrong in law for the following reasons:

(i) section 87A should not be read restrictively;

(ii) the preamble of an Act should not be used to interpret the Act where the provision is unambiguous;

(iii) the case of *Texas Gulf* in fact supports the prosecution's case; and

(c) the facts in the present case clearly discloses a fraud as envisaged under s. 87A.

[14] I disagreed with the objection raised by the learned defence counsels. At the outset I must state that it is trite that the decision of the Sessions Court in *PP v. Yip Yee Foo* is not binding upon this court based on the binding precedent.

[15] I am of the opinion that s. 87A must be given a literal meaning as its provisions are clear and there is no ambiguity. The term 'any person' in s. 87A means any person and this includes a body of persons, corporate or incorporate as provided in s. 3 of the Interpretation Acts 1948 and 1967 (Act 388). In other words the word 'person' is given a very wide interpretation. Section 87A shows the legislature's intent that anyone who participates in the securities industry may be defrauded and this would no doubt include the victim who is the issuer of the securities or shares in question. Had Parliament intended to exclude the alleged victims who are the issuers of the securities or shares in question from the ambit of s. 87A, Parliament would have expressly provided that exemption in s. 87A. As such reading words which are not expressly provided in s. 87A would tantamount to usurping the powers of Parliament.

[16] I am fully mindful that a penal statute must be construed strictly as set out in the case of *PP v. Tan Tatt Eek & Other Appeals* [2005] 1 CLJ 713. I am equally mindful of the High Court decision in the case of *Ng Wu Hong* where after having considered *PP v. Tan Tatt Eek & Other Appeals* went further to point out that it would not be in tandem with the literal interpretation to give a restricted interpretation to s. 87A as it will give rise to a *lacuna* not intended by the legislature and which may allow fraud committed in off market transactions to go unpunished. The High Court emphasised that s. 87A must be interpreted flexibly and the protection accorded under this section extends to a broad range of market participants, not only to the investing public but also to protect investors and all market participants including intermediaries such as stockbroking companies, fund managers, investment advisers and others.

[17] As such, I disagree with the argument that s. 87A is inapplicable in a situation where the company which is defrauded is the same company which issues the shares. Section 87A must be read literally as its provisions are clear and unambiguous. What is necessary under s. 87A is that a public listed company is defrauded because invariably such a listed company has public shareholders as its investors. This would mean that if the public listed company is defrauded its investors would also be defrauded.

[18] The learned defence counsels relying on *PP v. Yip Yee Foo* submitted streneously that the preamble to SIA would show that s. 87A is aimed at protecting the investing public and could not be applied to a private deal. The preamble to the SIA reads as follows: "An Act to make provisions with respect to stock exchanges and persons dealing in securities, and for certain offences relating to trading in securities, and for other purposes connected therewith". Based on the preamble there is nothing to suggest that s. 87A is not intended to apply to persons dealing in securities, be it by the investing public or by way of private deals. Be that as it may, I do not find it necessary to resort to the preamble since s. 87A is explicit and unambiguous (see *PP v. Ng Wu Hong and Ors*). As to the strength to be attached to a preamble the Federal Court case of *Re Application of Tan Boon Liat @ Allen; Tan Boon Liat v. Menteri Hal Ehwal Dalam Negeri, Malaysia & Ors* [1976] 1 LNS 126 is instructive which decided:

> Although the preamble is a part of a statute, it is not an operating part thereof. The aid of the preamble can be taken only when there is some doubt about the meaning of the operative part of the statute. ...Where the enacting part is explicit and unambiguous the preamble cannot be resorted to, to control, qualify or restrict it.

[19] On the issue that s. 87A is aimed at protecting the investing public and cannot be applied to a private deal as in the present case I agree with the learned DPP's submissions that it is obvious that where

a public listed company is involved, invariably there are public shareholders. A company only becomes a public listed company when its shares are owned by the public at large and traded freely in the stock exchange. Rule 3.05 of the listing requirements of Bursa Malaysia clearly requires that 25% of a public listed company's issued and paid up capital must be in the hands of public shareholders. Without this public shareholders, a company cannot achieve the public listed company status. As such if a share transaction involves an agreement between one shareholder and another, this cannot at any time be tantamount to suggesting that such a private deal can effectively allow the dissipation of assets belonging to the public listed company. To claim that a deal is a private deal and hence s. 87A is inapplicable cannot hold water as the actions of the contracting shareholders have the effect of depriving minority shareholders of their investments or diminishing the value of their investments in the listed company when company assets are dissipated. In any event private deals are transactions which take place on the stock market and are termed as Direct Business Transactions which must, in accordance with the stock exchange rules be reported to the stock exchange (see r. 902.2 of the Bursa Malaysia Rules).

[20] I also agree with the learned DPP's submission that the case of *Texas Gulf Sulphur* in fact supports the prosecution's case. The case held that r. 10b-5 in the US, which is the equivalent to s. 87A, was promulgated with the intent to prevent inequitable and unfair practices and ensure fairness in securities transactions generally, whether conducted face to face, over the counter or on exchanges. Hence, there is nothing in the case that states that a company cannot be defrauded in any transactions relating to the sale and purchase of securities. This position is further supported by the US case law such as *Perry Hooper v. Mountain States Securities Corp* [282 F.2d 195] (quoted in *Ng Wu Hong*'s case), *Speed v. Transamerica* [99 f Supp 808 (D Del 1951)] and *Chris-Craft Industries Inc v. Piper Aircraft Corp* [480 F 2d 341, Fed Sec L Rep (CCH) 93816, 25 ALR Fed 534]. In other words rule 10b-5 has been given a wide interpretation and has been applied in a range of situations without constraints and limitations.

[21] Finally the evidence in the present case overwhelmingly discloses a fraud committed against Multicode which to my mind is what is envisaged under s. 87A. The facts in this case blatantly show that the money uplifted from Multicode's FDs accounts by both the accused were used to purchase the shares of Multicode. These monies were never returned to the company. The ultimate victim in this case is Multicode as a company and its shareholders. I agree with the learned DPP's submission that by holding s. 87A to be inapplicable to such clear cut situations will give rise to a *lacuna* not intended by the legislature and fraud would fly in the face of public listed companies and their investors who are no longer protected from such fraudulent activities.

Both The Accused Had Caused The Uplifting Of FDs Belonging To Multicode Amounting To RM18,146,168.74

[22] The oral and documentary evidence adduced before me overwhelmingly shows that both the accused had uplifted the FDs belonging to Multicode amounting to RM18,146,168.74 between 26 and 28 March 2007. The FDs certificates have been produced in court and dutifully marked as exhs. P9A-R, P10A-J, P11A-J, P12A-L and P13A-H.

[23] PW1 testified that he had sold his and his family's shares to APSB on 23 March 2007 and that the first accused is the representative of APSB. PW6 corroborated the evidence of PW1 and added that during the BOD meeting on 23 March 2007 the first accused had informed the BOD that he represented APSB. PW6 also confirmed the change of signatories of Multicode accounts took place at the BOD's meeting held on 23 March 2007. This is reflected in the minutes of the 23 March 2007 BOD's meeting (see exh. P6). The first accused was appointed as the sole signatory for any amounts below RM300,000 while both the accused were the joint signatories for amounts above RM300,000. PW6 explained that the BOD had approved the change in the signatories on 23 March 2007 simply because the first accused was representing the single largest shareholder of Multicode and was now also the CEO of the company.

[24] PW6 further explained that on the very next day, that is 24 March 2007, the first accused called him to say that he wants to have the handover of Multicode's assets as soon as possible and asked for the handover to take place on 25 March 2007. PW6 however informed the first accused that this was not possible as it was a Sunday. The first accused then told PW6 that the handover to take place on the morning of 26 March 2007.

[25] PW6 also testified that prior to the handover, Multicode had in FDs a sum of between RM30 million to RM31 million. PW6 explained to the court that on the day of the handover, that is 26 March 2007, he witnessed PW1 handing over the FDs certificates to the first accused in the presence of the second accused. Both PW1 and PW4 also confirmed that the second accused was present during the handover of the FDs.

[26] PW4 testified that on 26 March 2007 the first accused had introduced himself to her as the CEO of Multicode and the second accused as the new director of Multicode. PW4 explained that after all the FDs certificates were handed over to the first accused, the first accused asked that the second accused and Daniel Wong be accompanied to the banks by a Multicode employee. PW4 then arranged

PW5 to accompany them to the banks. The evidence also revealed that subsequently the first accused went to the banks after the handover because Shao Wei ("PW12"), an officer with Public Bank, demanded the presence of the new signatories.

[27] PW5 explained that the funds belonging to Multicode as set out in exh. P30 amounting to RM29 million were with Multicode on 26 March 2007 prior to the handover to both the accused. She corroborated the evidence of PW4 that she was asked by PW4 to accompany the second accused to the banks. According to her they first went to the Public Bank where subsequently the first accused joined them and both the accused proceeded to uplift the FDs at the various banks where Multicode had its accounts.

[28] PW12 confirmed that all the FDs from Multicode's account in the Public Bank at Taman Sentosa Branch in Johor Bahru amounting to RM4 million, excluding the interest, had been uplifted by both the accused on 26 March 2007 (exhs. P13A-P13H). He explained that on 26 March 2007, four persons came to the branch, amongst who were both the accused and PW5. They informed him that both the accused had taken over the company and requested for a change of signatories. They presented the documents for change of signatories and immediately after that, requested for the FDs to be uplifted. PW12's evidence was corroborated by the evidence of PW5 when she said that the first accused informed PW12 that the upliftment of the FDs was for purposes of due diligence testing. The material part of PW12's evidence is as follows:

> I told Mr. Gordon Toh (First Accused) I need 1 to 2 days time to look at the documents before proceeding with the upliftment but he insisted that I uplift on the same day because he wanted to conduct due diligence to make sure no negative pledge on the FDs. Because of his insistence I did several checking. I checked Bursa's announcement to confirm the change in directorship in the company. I also contacted the company secretary Mr. Yap to confirm the change in directorship and change of signatories. After we have confirmed that, we allowed the upliftment.

[29] PW12 further testified that the amounts that had been uplifted were transferred into the account of EGS (account number 0012011015003) on the 26 March 2007. He confirmed that both the accused had signed at the bottom of the remittance application form (exh. P31).

[30] Norhayati binti Jasri ("PW13") and Masitah binti Maskan ("PW16") of Bank Rakyat confirmed that all the FDs in Bank Rakyat belonging to Multicode amounting to RM9 million were uplifted (see exhs. P9A-P9R and P48A-P48R). PW16 identified the first and second

A accused as having uplifted the FDs on the 27 March 2007. The monies from Bank Rakyat were transferred to Multicode's account in Maybank at the Permas Jaya branch (see exhs. P35, P49 and P50).

[31] Abu Talib bin Haron ("PW14") of RHB bank confirmed that a
B total sum of RM5 million in FDs belonging to Multicode (see exhs. P11A-P11J) in RHB Bank were uplifted by both the accused on 26 March 2007 (see exhs. P51A-P52J). Both the accused had instructed RHB Bank to perform the upliftment by way of a letter of instruction signed by them (exh. P32). PW14 also confirmed that after the FDs (exhs. P11A-P11J) were uplifted, the sum of RM5 million was
C transferred into EGS account on the same day (exhs. P52A-P52B).

[32] In short the total sum of RM18,146,168.74, belonging to Multicode in the three banks, namely Public Bank, Bank Rakyat and RHB Bank was uplifted by both the accused.

D **RM17,552,275.20 Was Subsequently Paid To Kenanga Indirectly In Connection With The Purchase Of Securities Namely, 11.1 Million Multicode's Shares By The First Accused *Via* APSB**

[33] The evidence adduced by the prosecution overwhelmingly points
E to the fact that out of the monies which were uplifted from RHB Bank, Public Bank and Bank Rakyat by both the accused, a sum of RM17,552,275.74 was paid to Kenanga through trading account number 3AC0027 for the purchase of 11.1 million Multicode shares belonging to PW1 and his family by the first accused *via* APSB. The 11.1 million
F shares comprised of 10,295,000 shares belonging to PW1, 500,000 shares belonging to PW1's wife, Lee Siew Kiat, and 305,000 shares belonging to Lee Puay Heng ("PW11"). This is corroborated by Er Ee @ Er Chin Her ("PW19"), Head of Branch and Head of Dealing of Kenanga Investment Bank, Johor Bahru. He confirmed that the 11.1
G million shares belonging to PW1, PW1's wife and PW11 shares were sold to APSB. PW19's evidence is supported by exhs. P58A, P58B, P59A, P59B, P60A, P60B, P61A and P61B. Liew Chee Kiong (PW20) the remisier in Kenanga Investment Bank, Johor Bahru Branch for the shares belonging to PW1's wife confirmed the execution of the sale transaction as evidenced by P60A and P60B. The fact that the
H transaction for the purchase of the 11.1 million Multicode shares took place on 23 March 2007 was also attested to by Mohamad Rhiaz bin Mohamed Zamirdin ("PW22") of Kenanga Investment Bank and supported by P63A, P63B, P63C, P63D, P66A and P66B.

I **[34]** PW19 confirmed that the consideration for the purchase of the 11.1 million shares is RM17,552,275.20. He confirmed that payment was made *vide* cheques and the vouchers and cheques (see exhs. P14A, 14B, P15A, P15B, P16A, P16B, P17A and P17B).

[35] PW19 also explained that the transaction for the purchase of the 11.1 million Multicode shares took place on 23 March 2007 and would require three clear working days for settlement and would therefore need to be settled on 28 March 2007.

[36] That the 11.1 million shares were indeed sold to the first accused is further fortified by the announcement to Bursa Malaysia (see exh. P18) stating that the first accused had purchased 11.1 million shares for a total consideration of RM17,760,000 and that he had a deemed interest through his shareholding in APSB. PW19 explained that the sum RM17,552,275.20 is different due to the outstanding interest and fees imposed which were set off from the sum of RM17,760,000.

[37] The fact that the first accused represented APSB was corroborated by PW6 who said that the first accused mentioned this at the BOD meeting on 23 March 2007. The fact that APSB was in fact the vehicle used by the first accused to purchase the shares from PW1 and his family is clearly seen in the evidence of Lee Kok Khee ("PW21"). PW21 testified that the first accused had told him of his intention to buy a block of Multicode shares through APSB. He said that APSB would be the vehicle that would purchase the shares. APSB was a client of Kenanga and PW26 was told by the first accused that he had the funds to purchase the block of shares. This was evidenced by a letter issued by APSB to Kenanga dated 23 March 2007 (see exh. P28) to state that APSB had made arrangements with Ambank to release to Kenanga a sum of RM29.5 million for the purposes of the said acquisition.

[38] PW21 explained to the court that Sam San Fook Choy ("PW27") who had attended the meeting with SP21 and the first accused did not impressed PW21 that APSB was represented by PW27 as all the explanations pertaining to the purchase of the block of 11.1 million shares in Multicode by APSB were offered by the first accused. PW27 had testified that APSB belonged to his wife How Yoke Wan ("PW30") and that this company did not do any business.

[39] PW21 and PW27's evidence is consistent with PW22's evidence in respect of APSB. PW22 testified that when he met the first accused for the account opening by APSB with Kenanga, the first accused had said that it was pertaining to the takeover of Multicode. He said that the first accused mentioned his intentions of what he wanted to do with Multicode once he took over the company. He also stated APSB is supposed to be his vehicle for the takeover of Multicode. I agree with the learned DPP that since all the discussions with APSB were held with the first accused and read together with exh. P18 it shows that the first accused was the true identity behind APSB.

[40] On the other hand PW30 whose signature appeared as a director of APSB and authorised signatory of the accounts of APSB (see exhs. P73A and P64) clearly admitted not knowing the purpose for which the APSB account was opened with Kenanga. She stated that she was asked to do so by her husband (PW27). PW27 in his evidence stated that he did not operate APSB's bank account and that he had lent the use of APSB as a favour to his friend, Daniel Wong. When shown exhs. P64 and P28, PW27 stated that he did not understand what it was for and merely signed the documents. He also said that although he went to Kenanga, he did not know the purpose of going there and had done so on Daniel Wong's request. In cross-examination, PW27 even disclosed that he did not know that the purchase of the 11.1 million shares was registered in the name of APSB.

[41] PW23 testified that although the buyer of the 11.1 million Multicode shares was APSB, the settlement of money for the transaction would be made by EGS. PW23 also testified that he had received exh. P62 from Ambank informing Kenanga that their client EGS had instructed Ambank to pay RM29.5 million by way of telegraphic transfer to Kenanga no later than 27 March 2007. PW23 then issued a letter now marked as exh. P67 advising Ambank of the correct account details of Kenanga into which the funds for the purchase of the Multicode shares amounting to RM17,552,275.20 are to be credited.

[42] PW24 testified that he issued exh. P62 on the request of the first accused who asked him for help on 23 March 2007 to issue the letter of undertaking to Kenanga pertaining to his intention to buy Multicode shares. He said that the first accused required this letter because Kenanga needed this letter to proceed with the purchase of the shares. At the time of the issue of exh. P62, the monies were not in EGS account with Ambank. PW24 confirmed that the monies came in later, that is on the 27 March 2007. PW24 also testified that EGS were their clients and that the first accused solely operated its account with Ambank (see exh. P68). PW24 also confirmed having received a cheque for the sum of RM17,552,275.20 (see exh. P70) signed by the first accused on behalf of EGS to Ambank dated 27 March 2007. PW24 confirmed that upon receipt of the funds they were transferred to Kenanga on 27 March 2007 by way of telegraphic transfer by Ambank on behalf of EGS.

[43] In short the money trail shows that the funds uplifted from the three banks amounting to RM18,146,168.74 were in fact transferred to EGS and then to Kenanga *via* EGS's account at Ambank. In so far as funds from Bank Rakyat were concerned, these funds amounting to RM9 million were transferred to Multicode's account with Maybank Permas Jaya. This was explained by PW18 and referred to exh. P49 which showed the flow of funds from Bank Rakyat on 27 March 2007.

He also testified that with reference to exh. P36, the funds with Maybank Permas Jaya amounting to RM9 million were transferred to EGS on 27 March 2007 upon the instructions of both the accused who had signed on exh. P36. PW12 testified that the funds in Public Bank amounting to RM4 million were directly transferred to EGS account (see exh. P31) on the instructions of both the accused as evidence by their signatures on the telegraphic transfer forms. PW14 testified that a total of RM5 million in FDs belonging to Multicode (see exhs. P11A-P11J) at RHB bank were uplifted by both the accused on 26 March 2007. Both the accused had signed on exhs. P11A-P11J together with exh. P32. Exhibit P52A clearly shows a remittance application form requesting that the amount uplifted from RHB as set out in exhs. P51A-P51J, amounting to RM5,554,817.82 were transferred on the instructions of both the accused to EGS (see exh. P52B).

Engaged In An Act Which Operated As A Fraud On Multicode

[44] I agree with the learned DPP that the following acts committed by both the accused have operated as a fraud against Multicode:

(a) the first accused took control of Multicode through the purchase of the 11.1 million shares which were transacted on 23 March 2007. On the very same day a special BOD meeting was held to appoint new directors which included both the accused and two other persons namely Mohd Noor bin Ibrahim ("DW3") and Lena Loh. Apart from a change in directors, a change in bank signatories also took place on the same day where the original signatories were replaced by both the accused. Exhibit P6 clearly shows that for amounts of RM300,000 and below, the first accused was to be the sole signatory and for amounts above RM300,000 both the accused were to be the joint signatories. The first accused was also appointed as the CEO for the day to day operations of the company;

(b) at the same BOD's meeting, apart from a change in signatories, no other authorisation was given to both the accused to uplift the monies belonging to the company which was placed in the FDs in the various banks, namely RHB Bank, Public Bank, Bank Rakyat, Maybank and Affin Bank. This fact is supported by the evidence of PW2, PW6, Datuk Hj Sulaiman bin Ahmad ("PW7") and Yap Kai Weng ("PW10"). This is also very clear from the minutes of the BOD's meeting dated 23 March 2007 (exh. P6). Exhibit P6 was subsequently approved and adopted by the BOD at its meeting on the 29 March 2007 and at no time was there any suggestion that the minutes in exh. P6 were incomplete or inaccurate. Therefore, had there been any discussion on upliftment and investment of the

A FDs at the BOD's meeting on 23 March 2007, both the accused should have attempted to correct this at the next BOD's meeting on 29 March 2007;

(c) it is very obvious that the accused exploited the T + 3 days mode of payment of the shares transacted. The first accused was only required to make payment for the shares transacted three business days after the date of transaction. Since the sale of the 11.1 million Multicode shares was transacted on 23 March 2007, the first accused was given up to 28 March 2007 to provide the cash for the transaction. Both the accused, by virtue of taking control of the BOD of the company on 23 March 2007, were able to access the company's funds in the form of the FDs at the various banks and swiftly proceeded to uplift those funds for the purpose of making payment for the 11.1 million shares purchased from PW1 and his family members;

(d) PW6 testified that the first accused had called him on the 24 March 2007 (Saturday) asking for the handover of the company to be done on Sunday, the 25 March 2007. According to PW6 the first accused was very anxious to have the handover the soonest. This clearly demonstrated his eagerness to access the company's FDs the soonest after the share purchase transaction took place on 23 March 2007;

(e) the sum of RM17,552,275.20 which constituted part of the monies which were uplifted from the three of banks that is RHB Bank, Public Bank and Bank Rakyat were then used to finance the purchase of the 11.1 million shares by the first accused via APSB on 27 March 2007;

(f) the first accused with the abetment of the second accused had therefore used the company funds to take control of the company thereby committing an act which operated as a fraud on the other BOD members and the shareholders of the company;

(g) the first accused had misrepresented to PW1 and others that he was a fund manager and had parked his money in Malaysia and that he had the monies to buy the shares when in fact he used Multicode's own FDs to fund his entry into the company;

(h) both the accused tried to shift the blame on Daniel Wong, who is said to have asked PW27 to act on his behalf by loaning APSB to him. The fact remains clear that Daniel Wong was not a director or a signatory of the funds of Multicode. On the other hand, both the accused were directors and authorised signatories of the FDs and had used this position to defraud the company;

(i) the fraud committed by both the accused can be seen clearly from their subsequent conduct. In the BOD's meeting dated 29 March 2007 (see exh. P40) the first accused was allowed to 'seek and identify new business avenues for the company to invest'. However, what was not made known to the rest of the BOD members was that long before the 29 March 2007, both the accused had already uplifted the monies belonging to the company and that such monies were used to pay for first accused's purchase of the 11.1 million shares in Multicode. In other words both the accused attempted to conceal from the BOD the upliftment of the FDs which had been carried out between 26 and 28 March 2007;

(j) PW6 explained that at the meeting of 29 March 2007 both the accused were to look for good investments for the company and would come back to the BOD before proceeding to make any investments. Clearly therefore, even on 29 March 2007 there was no authorisation by the BOD to allow both the accused to proceed with such investments. Both PW6 and PW9 testified that they were not aware that the FDs were already uplifted by 29 March 2007. They were only made aware of the upliftment on 25 September 2007;

(k) the subsequent conduct of the first accused also clearly shows that he had intended to hide from the company management the fact that the FD's belonging to the company had been uplifted. According to the evidence of PW4, she had sought explanation from first accused as to the location of the FDs monies as it was her job to track the movement of the company funds. However PW4 stated that she could not understand the first accused's explanation and that what she could see was that the monies were not placed in Multicode's name. In response to her queries, PW4 said the first accused amongst others brought her to Kuala Lumpur to meet Suisse Credit officers but which of course did not take place and she was also showed an escrow agreement but which she did not understand what it was all about;

(l) PW5, who was asked to accompany the second accused to the banks too was unaware as to the reason for the transfer of the funds but had heard the first accused inform PW12 that it was for due diligence testing. PW12 explained that the first accused had insisted that the FDs at Public Bank amounting to RM4 million be uplifted on the very same day, that is, 26 March 2007 although PW12 had asked for one to two days to look at the documents before proceeding with the upliftment. PW12 when asked about the reason given by first accused for the upliftment, which purportedly was for due diligence test, that is to determine if there was a negative pledge on the account, PW12 found that the reason was

A not normal. According to PW12, if there was a pledge in the account, he would certainly know about this as the bank system could have an indicator to show such negative pledge. On the other hand PW5 who had prepared a document (exh. P30) detailing out the movements of the company's FDs monies clearly showed that
B the funds of Multicode in Bank Rakyat, RHB Bank and Public Bank were instead transferred to EGS;

(m) it is obvious that the first accused's attempts to rely on an escrow agreement was merely to confuse the BOD members and the company staff;
C

(n) Lee Ah Too ("PW26"), an external auditor of Multicode attached to Ernst & Young, testified that during the final audit conducted on Multicode for financial year end 31 July 2007, they discovered several irregularities among which was the lack of supporting
D documents in relation to the bank balances of Multicode. As a result of that, the first accused was required to provide the supporting documents needed. However, the first accused failed to do so. The first accused then promised Multicode's BOD to return Multicode's funds into Multicode's accounts. However, the funds were never returned by the first accused. It can be seen that first
E accused attempted to hide his wrongdoing by stating that he had 'accidently' sent the bank confirmations which were meant to be sent by Ernst & Young as auditors to the banks where Multicode's monies were purportedly located. The response received by the auditors aroused their suspicions over the genuinity of the bank
F confirmations. When the auditors decided to visit the bank and so called 'escrow agent' in Singapore on 9 October 2007, they could not obtain such confirmations. As a result due to the fact that Multicode's monies were still unaccounted Ernst & Young decided to issue qualified accounts. According to PW26 this was a very
G serious matter;

(o) what was even more fraudulent on the part of the first accused according to PW9, is that the first accused produced two RHB FDs (see exh. P43B) and showed them to Multicode's BOD and
H said that the funds were already credited into Multicode's accounts. However, the funds were never credited and worst still according to Eddiza bin Zakaria ("PW28") and Ng Seer Seng ("PW29") exh. P43B are forged RHB FDs certificates as they were not issued by RHB;

I (p) this subsequent conduct of the first accused show that the first accused went to the extent of producing forged documents (exh. P43B) in order to cover up his criminal act;

(q) in short both the accused had knowingly made false representations to the BOD of Multicode and the employees of Multicode by not disclosing the fact that they had uplifted the monies belonging to Multicode on the 26 March 2007 and had used the company's own funds to enable the first accused to control the company and to finance the acquisition of that control. As for the second accused, although he did not benefit in the same manner, he made false representations to the BOD by not disclosing the upliftment of the monies.

[45] The term 'fraud' has been considered in several cases. In the case of *PJTV Denson (M) Sdn Bhd & Ors v. Roxy (Malaysia) Sdn Bhd* [1980] 1 LNS 55; [1980] 2 MLJ 136, the court at p. 138 stated that "whether fraud exists is a question of fact to be decided upon the circumstances of each particular case. Fraud must mean "actual fraud, that is, dishonesty of some sort".

[46] In the present case the cumulative conduct of both the accused tantamount to fraud. They knew that the BOD had not authorised them to uplift the FDs but nevertheless proceeded to uplift the monies. They did not inform the BOD of this fact when they met the BOD subsequently on the 29 March 2007 but instead made references to possible investments in the future. In the case of the first accused he took it one step further to use this money to finance the purchase of the 11.1 million shares in Multicode. The second accused was instrumental in the uplifting itself and did not inform the board of this crucial fact at the BOD's meeting on 29 March 2007.

The Second Accused Abetted The First Accused In The Commission Of The Offence

[47] The second accused is charged with having abetted the first accused with respect to the charge under s. 87A(b) of the SIA. The law on abetment is set out in s. 107 of the Penal Code which provides that a person abets the doing of a thing who:

(a) instigates any person to do that thing;

(b) engages with one or more other person or persons in any conspiracy for the doing of that thing, if an act or illegal omission takes place in pursuance of that conspiracy, and in order to the doing of that thing; or

(c) intentionally aids, by any act or illegal omission the doing of that thing.

[48] The evidence clearly shows that the second accused had abetted the first accused. The second accused was appointed as the director of Multicode together with the first accused on 23 March 2007. He was made the authorised signatory of Multicode's account together with the first accused. Whether he accepted reluctantly as a signatory is not relevant because he could have refused the appointment. He abetted the first accused by uplifting Multicode's FDs and authorised the transfer of the funds to third party accounts including EGS's account. The second accused was present during the 23 March 2007 BOD's meeting and very well knew that the BOD had not discussed and approved the upliftment of the FDs. As the second accused was one of the authorised signatories for Multicode's account, the FDs could not have been uplifted and transferred out of Multicode's account without his authorisation. Thus, as a result of his abetment in authorising the upliftment and the transfer of Multicode's funds to third party and the second accused had enabled the first accused to use Multicode's funds to purchase the 11.1 million Multicode's shares.

[49] The second accused despite having the knowledge that Multicode's FDs monies were withdrawn and transferred out from Multicode's account to third party accounts, did not inform the BOD during its subsequent meetings including the meeting on 29 March 2007 the fact that the monies were already uplifted and transferred into third parties accounts. In short the second accused had intentionally aided the first accused in the doing all the illegal acts and the monies could not have been uplifted without his participation, though he may have been passive compared to the first accused.

Alternative Charge - s. 409 Of The Penal Code

[50] Both the accused faced the alternative charge under s. 409 of the Penal Code. The relevant provisions read as follows:

> Criminal breach of trust by public servant, or by banker, merchant or agent
>
> 409. Whoever, being in any manner entrusted with property, or with any dominion over property, in his capacity of a public servant or an agent, commits criminal breach of trust in respect of that property, shall be punished with imprisonment for a term which shall not be less than two years and not more than twenty years and with whipping, and shall also be liable to fine.
>
> Criminal breach of trust
>
> 405. Whoever, being in any manner entrusted with property, or with any dominion over property either solely or jointly with any other person, dishonestly misappropriates, or converts to his own use, that property, or dishonestly uses or disposes of that, dishonestly

misappropriates, or converts to his own use that property, or dishonestly uses or disposes of that property in violation of any direction of law prescribing the mode in which such trust is to be discharged, or of any legal contract, express or implied, which he has made touching the discharge of such trust, or wilfully suffers any other person so to do, commits "criminal breach of trust".

Definition of "agent", "company", "director", "officer"

402A. For the purposes of sections 403, 403A, 403B, and 403C, 404, 405, 406, 407, 408, 409, 409A, 409B, 415, 416, 417, 418, 419, and 420 of this Chapter, unless the contrary appears from the context:

"agent" includes any corporation or other person acting or having been acting or desirous or intending to act for on behalf of any company or other person whether as agent, partner, co-owner, clerk, servant, employee, banker, broker, auctioneer, architect, clerk of works, engineer, advocate and solicitor, accountant, auditor, surveyor, buyer, salesman, trustee executor, administrator, liquidator, trustee within the meaning of any Act relating to trusteeship or bankruptcy, receiver, director, manager or other officer of any company, club, partnership or association or in any other capacity either alone or jointly with any other person and whether in his own name or in the name of his principal or not; …

"company" means a company incorporated under any relevant law for the time being in force or pursuant to any corresponding previous enactment and includes any statutory corporations;

"director" includes any person occupying the position of director of a company, by whatever name called, and includes a person who acts or issues directions or instructions in a manner in which directors of a company are accustomed to issue or act, and includes an alternate or substitute director, notwithstanding any defect in the appointment or qualification of such person;…

[51] The prosecution is required to prove the following ingredients for an offence of breach of trust under s. 409 of the Penal Code:

(a) both the accused were agents of Multicode at the material time;

(b) both the accused were entrusted with the property or with dominion over the property; and

(c) both the accused committed criminal breach of trust in respect of the property.

Agent

[52] There is an abundance of evidence by way of PW1, PW2, PW4, PW5, PW6, PW7, PW9, PW10 and others to show that both the accused were agents of Multicode at all material times. They were the directors of Multicode. The first accused was appointed as a non-independent executive director and the CEO whereas second accused was appointed as independent non-executive director of Multicode on 23 March 2007. The appointment of both the accused is also reflected in the BOD's minutes of meeting dated 23 March 2007 (see exh. P6). After being appointed, the first accused very promptly took over the role of CEO as evidenced by the handing over of Multicode's assets including the factories keys, car keys and the FDs which took place on 26 March 2007.

[53] Not only were both the accused appointed as directors of Multicode, but they were also appointed as the two authorised signatories to the banking accounts of Multicode (see exh. P6). PW7 who is one of the directors of Multicode testified that first accused asked him to withdraw himself as a signatory for Multicode in the BOD's meeting held on 23 March 2007 evincing his intention to effectively command financial control of the company.

Entrustment Or Dominion Of The Property

[54] The property in question are the FDs of Multicode amounting to RM26,045,473.94 held in the Public Bank, Bank Rakyat, Maybank, RHB and Affin Bank in Johor Bahru. The FDs certificates have been produced in court and have been marked as exhs. P9A-R, P10A-J, P11A-J, P12A-L and P13A-H. That the FDs were properties belonging to Multicode was corroborated by the testimony of PW1, PW4, PW5, PW6, PW9 and the bank officers including PW12 to PW18. PW5 had also produced exh. P8A which shows the particulars of the FDs held by the company.

[55] There is overwhelming evidence through PW1, PW2, PW4, PW5, PW6, PW7, PW9 and PW10 that it was both the accused who were entrusted with and had dominion over the Multicode's FDs. Both the accused were appointed the authorised signatories of the banking accounts of Multicode (see exh. P6).

[56] The handover of Multicode's FDs (exhs. P9A-R, P10A-J, P11A-J, P12A-L and P13A-H) from PW1 to both the accused took place on the 26 March 2007. Also present during the handover in SP1's room were PW4 and PW6. PW1 testified that he had handed over the FDs certificates to the first accused from the safe and it was witnessed by PW4 and PW6 in their testimonies. PW6 also testified that the first

accused then gave all the FDs to Daniel Wong to do the comparison and checking with the list which is now tendered as exh. P8. In other words both the accused had on the 26 March 2007 the physical possession of the FDs.

[57] Learned DPP submitted that being vested with the powers of authorised signatories to a given account is akin to being given the keys to the safe of the company. They can then have access to the funds of the account. In the present case both the accused were the authorised signatories of the FDs and were therefore entrusted with the FDs of Multicode. Interestingly in *Gopalakrishnan Vanitha v. PP* [1999] 4 SLR 307, the High Court of Singapore had to deal with the question of law whether or not there was entrustment of pre-signed blank cheques and the court held:

> Perhaps to emphasise the point further, I would draw another example. Consider the factual scenario having been instead that the funds were kept as cash in a safe within the company premises and the key to the safe was entrusted to the appellant. It should be immediately apparent that the appellant was entrusted with, not just a mere piece of metal, but with all the funds of the company that were kept within that safe. So quite plainly, property was in fact entrusted to the appellant when she was given the signed blank cheques by Tracogna and this property was the funds belonging to the company, TRAC Chemicals Pte Ltd, kept in its bank account with the United Overseas Bank. The case of *Carl Elias Moses v. PP* did not apply to the present situation, which could be distinguished on the facts since the property - the funds belonging to the company - which was entrusted to the appellant, was the same property which she was being charged with misappropriating.

[58] The fact that both the accused had been made directors and authorised signatories of Multicode's banking accounts and coupled with the fact that they were given the physical FDs certificates and were able to uplift the FDs clearly show that they were entrusted with and had dominion over the companies FDs in their capacity as agents of Multicode.

Both The Accused Committed Criminal Breach Of Trust

[59] Based on the evidence before me, in particular the evidence of PW1, PW2, PW4, PW5, PW6, PW7, PW9 and the bank officers from PW12 to PW18 and the numerous documentary evidence, I am of the opinion that both the accused had in fact dishonestly misappropriated or converted the said monies belonging to Multicode by encashing the FDs (P9A-R, P10A-J, P11A-J, P12A-L and P13A-H) and crediting the monies into third party accounts.

[60] 'Dishonest misappropriation of property' is defined in s. 24 of the Penal Code as follows:

> "Dishonestly"
>
> 24. Whoever does anything with the intention of causing wrongful gain to one person, or wrongful loss to another person, irrespective of whether the act causes actual wrongful loss or gain, is said to do that thing "dishonestly".
>
> Explanation-In relation to the offence or criminal misappropriation or criminal breach of trust it is immaterial whether there was an intention to defraud or to deceive any person.

"Wrongful loss" and "wrongful gain" is defined in s. 23 of the Penal Code:

> "Wrongful gain" and "wrongful loss"
>
> 23. "Wrongful gain" is gain by unlawful means of property to which the person gaining is not legally entitled.
>
> "Wrongful loss" is the loss by unlawful means of property to which the person losing it is legally entitled.
>
> A person is said to gain wrongfully when such person retains wrongfully, as well as when such person acquires wrongfully. A person is said to lose wrongfully when such person is wrongfully kept out of any property, as well as when such person is wrongfully deprived of property.

[61] The evidence produced by the prosecution overwhelmingly shows that the BOD's meeting on 23 March 2007 did not discuss, approve or authorise both the accused to uplift the FDs belonging to Multicode.

[62] The evidence also conclusively demonstrates that the monies taken out by both the accused were not used in furtherance of Multicode's interests but *inter alia* to finance the purchase of Multicode's shares by the first accused *via* APSB. In this respect the element of dishonest misappropriation is clearly proven by showing that the first accused had wrongfully gained from his wrongdoings as an agent of Multicode and that both the accused by uplifting and transfering the monies to third parties accounts had caused wrongful loss to Multicode.

[63] I am fully mindful of the presumption of acting dishonestly under s. 409B of the Penal Code that provides that upon proof of misappropriation a presumption that the misappropriation was done

dishonestly automatically arises. This presumption was discussed in the case of *Chong Chiew Nam @ Chong Chee Wah v. PP* [1997] 1 LNS 34. Section 409B reads:

> Presumption
>
> 409B. (1) Where in any proceeding it is proved -
>
> (a) ...
>
> (b) for any offence prescribed in sections 405, 406, 407, 408 and 409, that any person entrusted with property or with dominion over property had -
>
> (i) misappropriated that property;
>
> (ii) used or disposed of that property in violation of any direction of law prescribing the mode in which such trust is to be discharged or of any legal contract, express or implied which he had made touching the discharge of such trust; or
>
> (iii) suffered any person to do any of the acts described in subparagraph (i) or (ii) above,
>
> it shall be presumed that he had acted dishonestly until the contrary is proved.

[64] I am of the opinion that even without any reliance on the presumption under s. 409B there is sufficient evidence on a *prima facie* basis that both the accused had dishonestly misappropriated the property of Multicode. The starting point is that both the accused had no authorisation from the BOD to uplift the FDs. They had at the earliest possible opportunity surreptitiously uplifted the FDs on the pretext of doing a due diligence test which does not seem normal and make sense as testified by PW12. The monies were then transferred to third party accounts amongst others to pay for the purchase of Multicode's shares within the T + 3 days. They concealed the fact from the BOD that the FDs had been uplifted and squandered. When the uplifting of the FDs was exposed by persons other then both the accused the first accused even went to the extent of producing forged RHB FDs (exh. 43B) to show that the monies are being returned to Multicode.

[65] At the close of the prosecution's case I decided that the prosecution had proven a *prima facie* case against both the accused in respect of the principal charge under s. 87A(b) of the SIA and the alternative charge under s. 409 of the Penal Code on the standard of proof as required in the cases of *PP v. Mohd Radzi Abu Bakar* [2006] 1 CLJ 457 and *Looi Kow Chai & Anor v. PP* [2003] 1 CLJ 734. I called upon both the accused to enter their defence against both the principal and the alternative charge. Both the accused chose to give sworn evidence after the three options were read and explained to them.

A **The Defence**

[66] The witnesses who gave evidence for the defence are as follows:

(a) the first accused (SD1);

B (b) the second accused (SD2);

(c) Mohd Noor bin Ibrahim (SD3); and

(d) Noor Azman bin Muhammad Isa (SD4).

C **[67]** At the end of the case for the defence in accordance with s. 173(m) of Criminal Procedure Code, the duty of the court is to consider all the evidence adduced before it and decide whether the prosecution has proven its case beyond reasonable doubt. In *Nagappan Kuppusamy v. PP* [1988] 1 CLJ 283; [1988] 1 CLJ (Rep) 229 it was held as follows:

D

> Here we have to go back to first principles. In a criminal proceeding the onus on the prosecution throughout is to prove beyond reasonable doubt. From the beginning to the end the burden remains on the prosecution to prove the guilt of the accused. At the close of the whole case the Court has to consider all the evidence adduced by both the
>
> E prosecution and the defence and has to be satisfied that the case has been proved beyond reasonable doubt.
>
> In other words at the close of the whole case the Court has to consider all the evidence before it whether they satisfy all the ingredients of the offence. If upon the whole evidence the Court it is left in a real state
>
> F of doubt the prosecution is said to have failed to satisfy the onus of proof which lies upon it.

[68] In *Mohamad Radhi Yaakob v. PP* [1991] 3 CLJ 2073; [1991] 1 CLJ (Rep) 311 the Supreme Court held that if defence is called, the

G duty of the accused is only to cast a reasonable doubt in the prosecution case. He is not required to prove his innocence beyond reasonable doubt. What is required to be shown by the accused is a defence which at the very least could give rise to a reasonable doubt was also stated in *Jaafar Ali v. PP* [1999] 1 CLJ 410 as follows:

H

> In considering all the evidence adduced, it is important to bear in mind that the onus of proof of guilt always rests with the prosecution and never shifts to the accused (*Wong Sieng Ping v. PP* [1967] 1 MLJ 56). All the accused had to do is to raise a reasonable doubt on the case of prosecution. He need not prove his innocence nor convince me of the
>
> I truth of his story. All that he has to do is to show that his defence might reasonably be true or probable so as the raise a reasonable doubt on the prosecution's case.

[69] Very briefly the issues raised by first accused in his testimony are as follows:

(a) BOD gave approval for upliftment of the FDs during the BOD's meeting on the 23 March 2007;

(b) all the banking documents for the upliftment of FDs were pre-signed at the request of Daniel Wong at Multicode's office;

(c) it was APSB which bought the 11.1 million shares from PW1 and his family;

(d) EGS was sold by the first accused to Daniel Wong;

(e) the handover was discussed during BOD meeting on 26 March 2007;

(f) the upliftment of the FDs was carried out *in lieu* of due diligence to determine if the FDs were encumbered;

(g) there was an agreement which authorised him to uplift the FDs; and

(h) Daniel Wong played a role in the purchase of the 11.1 million Multicode shares and the upliftment of the FDs.

[70] The second accused raised the following issues in his defence:

(a) BOD gave approval for upliftment of the FDs during the BOD's meeting on the 23 March 2007;

(b) all the banking documents for the upliftment of FDs were pre-signed at the request of Daniel Wong at Multicode's office;

(c) the reason for uplifting the FD's was to ensure no negative pledge on the FD; and

(d) second accused did not benefit from the whole transaction.

Approval Of BOD Given On 23 March 2007 For The Upliftment Of The FDs

[71] The first accused's evidence was that on the 23 March 2007 BOD's meeting, it was agreed that Multicode's FDs will be uplifted and notice was given to the BOD that the uplifting of the FDs was necessary *in lieu* of due diligence. The second accused's testified that during the 23 March 2007 BOD's meeting, there was a discussion held on the uplifting of the FDs. According to the second accused, Daniel Wong joined the meeting, introduced himself as the new owner and the first accused as the new CEO of Multicode and said that "we" should

A uplift the FDs to make sure it is free from encumbrances. However both the accused testified that the discussion on uplifting the FDs was not minuted in exh. P6.

[72] This is the gist of both the accused's defence that they were allowed to uplift the Multicode FDs on the grounds that this issue was discussed during the 23 March 2007 BOD's meeting. They further claimed that having noticed this omission in the minutes of the 23 March 2007 BOD's meeting (exh. P6) they had attempted to rectify exh. P6 at the subsequent BOD's meeting held on the 29 March 2007 but were brushed off by PW7 and PW10 on the grounds that this matter need not be minuted because both the accused are authorised signatories. They also testified that the prosecution witnesses were mistaken and not telling the truth when testifying that no discussion had preceded the upliftment of the FDs.

[73] The second accused even went further to explain that he had informed the BOD on the meeting of 29 March 2007 that he had uplifted the FDs belonging to Multicode. This again is not reflected in the minutes of the 29 March 2007 (exh. P40).

[74] The defence had called DW3 to support the evidence of both the accused on this issue. DW3 was appointed as a director of Multicode on the same day together with both the accused. DW3 in his testimony had said that Daniel Wong had joined the 23 March 2007 BOD's meeting and mentioned to the BOD that the FDs should be uplifted to make sure that they are free from encumbrances. DW3 also testified that during the 29 March 2007 BOD's meeting the second accused had raised the issue of the upliftment of the FDs and that it should be minuted in exh. P6. I must state that I personally caught DW3 reading out his answers from a piece of paper (marked as MAH1) which contained the answers given by DW3 during his examination in chief. I found DW3 untrustworthy as his credibility was shaken during the trial. This was evident from exh. MAH1 whereby all the evidence given by DW3 seemed to have been coached and derived from MAH1.

[75] I do not accept both the accused version on the following reasons:

(a) I must emphasise that upliftment of FDs in the tune of about RM31 million is no trivial matter. There is no doubt that it is a very serious matter as the amount involved is very substantial. To my mind a matter of such importance would have been minuted in exh. P6 if indeed such a discussion had taken place. Exhibit P6 certainly does not reflect what both the accused allege that the BOD had in fact approved the upliftment of the FDs. Nowhere in P6 does it state that there was any such discussion that took place pertaining to the upliftment of the FDs;

(b) I accept the oral evidence given by PW2, PW6, PW7, and PW10 that during the 23 March 2007 BOD's meeting, there was no discussion at all on the uplifting of the FDs. There was clearly no authorisation or approval given by the BOD to allow both the accused to uplift Multicode's FDs. I must state that PW2, PW6, PW7 and PW10 were very vigorously cross-examined by both the learned defence counsels for both the accused on this very crucial issue. I found their evidence to be consistent throughout and their credit remained unshaken. In short I found PW2, PW6, PW7, and PW10 to be truthful witnesses. In particular PW6 impressed me to be an upright and credible witness despite being subjected to a thorough cross-examination. I have no reason to disbelieve the evidence given by PW2, PW6, PW7, and PW10 on this issue;

(c) there is obviously no ratification on the issue of upliftment of the FDs. It is important to note that after the FD's were uplifted and more than RM26 million of Multicode's monies were transferred out to third parties there was another BOD's meeting convened on 29 March 2007. Both the accused attended this meeting and proceeded to discuss the investment of excess funds of Multicode as if these funds were still in Multicode's possession. The fact that the FDs had been uplifted by both the accused was hidden from the BOD. PW6, PW7, PW9 and PW10 clearly testified that both the accused never informed the BOD on 29 March 2007 that the FDs were already uplifted. The minutes of the 29 March 2007 BOD's meeting (exh. P40) also did not state that the first accused or the second accused had informed the BOD that the FDs were already uplifted. I find both the first accused and second accused as untruthful witnesses;

(d) based on exh. P40 it can be seen that instead of the second accused highlighting the fact that the FDs monies have been uplifted and transferred into third parties accounts the second accused had proposed to the BOD on 29 March 2007 about investing Multicode's funds into trust funds or bonds. This evidence is supported by PW6, PW9 and PW10 who attended the meeting;

(e) both the accused claimed that they had on 29 March 2007 made attempts to amend the minutes of the meeting of 23 March 2007. However there is not an iota of evidence to indicate in exh. P40 that the first accused or the second accused had suggested that the minutes should be corrected. When it was put to the first accused by the learned DPP during cross-examination that exh. P40 does not show him applying to amend the BOD's minutes of 23 March 2007 meeting, the first accused very reluctantly agreed that it was so. I found the first accused being evasive in relation to this issue during his cross-examination. I find both the accused to be

untruthful witnesses on the issue that they had attempted to amend the minutes of meeting to reflect that the BOD had approved the upliftment of the FDs. From the demeanour of both the accused it appeared to me that their evidence on their attempt to amend the minutes is an afterthought and a recent concoction of evidence;

(f) the evidence shows that the first time PW6 and PW9 heard that the FDs were in fact uplifted and no longer were in the company's books, was when the external auditors from Ernst and Young (PW26), started their work on the year end audit for Multicode for financial year end 31 July 2007. In other words for more than seven months both the accused chose to keep quiet on the upliftment and their involvement. In fact the evidence given by PW26 was that the second accused said to him in November 2007 that "it was only fair for Mr Gordon Toh to explain about the findings". This clearly shows that the second accused was not a mere passive player, as he had every available opportunity to raise the upliftment to the BOD and even to the auditor and yet had failed to do so.

[76] Having considered the evidence as a whole I am of the opinion that both the accused's version that there had been a discussion and approval on the upliftment of the Multicode FDs during the 23 March 2007 BOD meeting is a fabrication, a bare assertion and an empty conjecture without any evidence.

All The Banking Documents Were Pre-signed

[77] The first accused in his testimony claimed that Daniel Wong had asked him to pre-sign on all the FDs (exhs. P9A to R, P10A to J, P11A to J and P13A to H), forms and letters for the purpose of the upliftment. According to the first accused, it was Daniel Wong who decided where the uplifted monies were to be deposited. He added that as of 27 March 2007, he was not aware that the monies were to be transferred to APSB and EGS.

[78] The second accused testified that he had signed the documents for the upliftment of the FDs in blank at Multicode's office prior to making the trips to the bank. He claimed that he did so at Daniel Wong's behest. He also claimed that he uplifted the FDs in order to check that there was no negative pledge on the FDs and that the monies were meant to go back into Multicode's accounts.

[79] I do not accept both the accused's version on this issue on the following reasons:

(a) PW12, PW14, and PW16 had testified that both the accused had signed on the FDs certificates and the remittance documents in front of them;

(b) PW12 of Public Bank had testified that both the accused had signed on P31 and the FDs (exhs. P13A-H) in front of him. Exhibit P31 allowed the transfer of RM4 million from Multicode to EGS. On the second accused's oral evidence that the details in exh. P31 were not filled in when he signed on exh. P31 to my mind is a bare denial. It is illogical for the second accused to say that he was not aware that the monies were going to be transferred to EGS because the second accused was present with the first accused at the Public Bank when the request to uplift and transfer the FDs was made. Why were the first and second accused in such a haste to uplift the FDs and transfer it to third parties accounts?;

(c) PW14 of RHB Bank had testified that both the accused had signed the FDs (exhs. P11A-J) in front of him. PW14 also said that he saw both the accused signing the remittance application form, exh. P52B which allowed the RM5 million to be transferred from Multicode to EGS. PW14 also testified that when both the accused signed on exh. P52B, the form had already been filled up;

(d) PW16 of Bank Rakyat testified that both the accused went to Bank Rakyat and informed her that they wanted to uplift the FDs. PW16 also said that both the accused signed the FDs (exhs. P9A-R) in front of her. PW16 did not agree with the defence's suggestion that all the transactions were done by a person called Daniel Wong because both the accused were present when the request to uplift the FDs was made. With regard to exh. P55, PW16 testified that it was filled in by the first accused on 26 March 2007 in front of her. The second accused's claim that he signed exh. P55 in blank cannot be true because the second accused was present when the request was made to transfer the FDs funds to EGS;

(e) PW15 of Affin Bank said that the first accused had given the instructions to him over the phone to withdraw the FDs. According to PW15 it was only upon PW15 receiving exh. P33B, which was a letter on Multicode's letter head authorising the withdrawal and transfer of Multicode's FDs amounting to RM6 million to Maybank Permas Jaya, that the transfer of monies was effected;

(f) First accused admitted signing exh. P36 with the second accused which allowed RM9 million to be transferred from Maybank Permas Jaya to EGS' account. PW18 (Mohamad Hazri from Maybank Permas Jaya), testified that exh. P36 was signed by both first accused and second accused. PW18 also mentioned in his testimony that he had called the first accused to verify the transfer in exh. P36 and according to PW18, the first accused had confirmed the transfer;

(g) Both the accused had signed the letters (exhs. P32, P35 and P33B) instructing the banks (RHB Bank, Bank Rakyat and Affin Bank) to uplift Multicode's FDs and transfer the monies into EGS account. Exhibit P32 is the transfer from RHB Bank to EGS and also into another Multicode's account maintained at Maybank Permas Jaya. Exhibit P33B is the transfer from Affin Bank to Maybank Permas Jaya and exh. P35 from Bank Rakyat to Maybank Permas Jaya. All these were to enable the monies to be transferred into EGS and APSB's account. In fact exh. P32 is all the more serious as the recipient of the monies was clearly stated as EGS;

(h) both the accused claimed that they had signed the documents in blank cannot be true because all the documents are not standard documents but are on the Multicode's letter head. To my mind it is preponderous that the first accused, a highly qualified and experienced person where at one time he even held the office of an Executive Director of Midlands Bank, would have signed these documents in blank. Similarly it is illogical that the second accused, a director having the experience of having served on the BOD of seven public listed companies to sign blank letter heads. In any event both the accused had personally gone to all the five banks where Multicode's funds were kept. It is therefore illogical for both the accused to suggest that they had signed the documents in blank when they in fact made the visits to the banks and were fully aware as to why they went to the banks. The documents would show that both the accused's signatures are found not at the bottom of the letter but very neatly and precisely exactly just below the table which sets out the list of the FDs certificate numbers. It appears too much of a coincidence that their signatures on the letters of instruction to RHB Bank in exhs. P32, P33(b), P35 appear neatly at the foot of the printed content in all the documents. The only way that both the accused could have known where to place their signature would have been if the documents were already filled up. To my mind the evidence given by both the accused that had signed blank banking forms and documents is clearly that of a fabrication and a bare denial;

(i) the evidence clearly points to the fact that the remittance application forms were not signed in blank by both the accused as they had in fact played a very active role in the entire exercise and this is borne out by not only by their physical presence at the banks, but the explanations the first accused gave to the bank officers and even the supporting documentation which they signed in the capacity of being a director and authorised signatories of Multicode; and

(j) I accept the evidence of all the bank officers including PW12 to PW18 and accept them as witnesses of truth. They are independent witnesses from the financial institutions and had dutifully appeared in court to testify in court. They had no reason to lie. On the other hand I found both DW1 and DW2 to be evasive during cross examination on the issue that they had pre-signed the empty banking forms and documents and left an impression that it was recently fabricated evidence and they were not sure of it and that explains their evasiveness.

In Lieu Of Due Diligence And To Ensure No Negative Pledge On The FDs

[80] The first accused testified in examination in chief that the upliftment of the FDs was carried out *in lieu* of a due diligence exercise because a due diligence takes a very long time and involved a tedious process. During his cross-examination the first accused seemed to be unsure of his evidence. I observed the first accused making attempts and trying very hard to improve his evidence during his cross-examination particularly on this issue. When pressed by the learned DPP on the issue of due diligence the first accused appeared unsettled and defended by saying that it was Daniel Wong who told him of the need for a due diligence. It must be pointed out that during the first accused examination in chief the first accused did not suggest at all that it was Daniel Wong who had told him about the tedious process of due diligence. Instead he clearly said in his evidence in chief that the due diligence is required to verify the truth of the assets and it takes a long time and involved a tedious process. Nowhere did he mention Daniel Wong's name when he gave this evidence. In short the first accused's defence on this issue is clearly a recent fabrication.

[81] I agree with the learned DPP that the evidence given on this issue by the first accused was inconsistent. On the one hand the first accused agreed with the prosecution that when there is a takeover of a company, due diligence will provide a proper view of the financial assets of the company. The first accused also agreed that in a case that involved the purchase of shares with consideration of more than RM17.5 million, a careful deliberation in the form of a due diligence was required. However, when confronted whether in the present case, involving RM30 over million, it would be more appropriate that a due diligence be conducted, his answer was nonsensical when he said "not necessarily if buyer and seller are friendly or had agreed on certain terms prior to the purchase". It was very clear that the first accused is not consistent in his evidence and it was also apparent that the first accused was merely creating an unfounded explanation. In one breath the first accused says that careful deliberation was required in share transactions involving RM17.5 million and yet in the next breath he says that due

diligence was not necessary if buyer and seller had agreed on certain terms. There is also no evidence before me of any agreement between PW1 and the first accused or approval of the BOD that the FDs were to be uplifted *in lieu* of a due diligence.

[82] It is indeed baffling that the first accused claimed that the reason why he uplifted the FDs belonging to Multicode was to test whether the FDs were encumbered. According to PW12, in order to ascertain whether the FDs are encumbered or not, there is no necessity that the FDs be uplifted. PW12 further explained that "if there is a negative pledge in the account definitely I will be able to know because there is an indicator maintained in our system". The first accused's defence that the only way to know whether the FDs were encumbered was to uplift the FDs is completely baseless and illogical. The second accused during his cross-examination had, though reluctantly, agreed with the learned DPP that they could have employed other ways and means to determine if the FDs were encumbered instead of uplifting Multicode's FDs. I have no reason to disbelieve PW12's version as PW12 is an independent bank officer. It is obvious that the first accused uplifted the FDs on the pretext to test whether the FDs were encumbered when in actual fact his sole purpose of uplifting the FDs was to use the monies to purchase Multicode's shares.

[83] The second accused testified that he had uplifted the FDs as Daniel Wong said that 'we' should uplift the FDs to make sure they were free from encumbrances. The second accused also stated that he was not aware that Multicode's monies were going to be used to purchase the 11.1 million shares. I do not accept his version. The second accused claimed that upon upliftment the monies were meant to go back into Multicode but the second accused's actions in signing the transfer or remittance forms as well as letters of authorisation in blank is completely inconsistent with his evidence. If indeed the second accused had intended for the monies to go back to Multicode, he would not have signed the blank forms as he has alleged. By signing in the blank documents there would be no way of telling whether the money would go back to Multicode and there would be no way of controlling the movement of the money. The fact that the second accused signed on exh. P32 (letter of instruction instructing RHB to uplift and transfer funds to EGS), exh. P52B (remittance application form allowing funds to be transferred from RHB to EGS), exh. P36 (remittance application form allowing funds to be transferred from Bank Rakyat to EGS), exh. P55 (withdrawal slip requesting the FDs kept in Bank Rakyat be uplifted and transferred to EGS) and exh. P31(remittance application form allowing the funds to be transferred from Public Bank to EGS) shows that he knew that the monies belonging to Multicode were going to be transferred out of the company. I had observed the second accused testifying before me and I find that

he is no country bumpkin. He appears to me to be an intelligent witness and has even sat on seven public listed companies and therefore he would not be naive as he now pretends to be to have signed on blank remittance or transfer forms and other blank letterheads. I am therefore of the opinion that the second accused had the necessary knowledge that Multicode's monies were going to be uplifted and transferred to third party accounts.

It Was APSB And Not The First Accused Who Bought The 11.1 Million Shares

[84] It is not disputed that the 11.1 million Multicode shares were purchased by a company called APSB. The evidence disclosed that APSB was the vehicle used by the first accused for the purchase of the Multicode shares. This is also set out in exh. P18 which is the announcement dated 27 March 2007 to Bursa Malaysia which states clearly that the first accused had a deemed interest in Multicode through his shareholding in APSB.

[85] It was the submission of the learned counsel for the first accused that it was APSB and not the first accused which bought the 11.1 Multicode shares. The first accused denied being a representative of APSB and denied having any role to play in the preparation of exh. P28 which is the letter from APSB to Kenanga setting out the payment details for the 11.1 million shares. He claimed that Daniel Wong was the one who prepared exh. P28 and that he was only aware that APSB was used to purchase Multicode's shares on the day of the takeover, that is, 23 March 2007. He further claimed that when he met Lee Kok Khee (PW21), the Chief Operating Officer of Kenanga, he did not say that APSB would be the vehicle used to purchase Multicode's shares.

[86] I do not accept the first accused's version and find him to be untruthful. PW1 had testified that the first accused had informed him at the Zone Hotel that he represented APSB, the vehicle to be used to buy PW1 and his family shares. The evidence of PW6 is very clear that the first accused had announced to the BOD on 23 March 2007 that he represented APSB. I find both PW1 and PW6 as truthful and consistent witnesses. This is also consistent with the conduct and the actions taken by the first accused that he in fact represented APSB.

[87] Both PW21 and PW22 of Kenanga gave evidence that the first accused had told them that he was APSB's representative and that he had plans for Multicode once he takes over Multicode. PW21 testified that when he met the first accused at his Kenanga office, the first accused had told him of his intention to purchase Multicode's shares. The first accused further informed PW21 that he was an engineer by training and he was interested in managing Multicode after purchasing Multicode's shares through APSB. PW22 also testified that when he met

A the first accused, the first accused told him that APSB will be used as a vehicle to purchase Multicode's shares and the first accused even told PW22 what he wanted to do with Multicode once he takes over the company. In any event when confronted in cross-examination the first accused admitted that he never attempted to correct PW27 when PW27 B informed PW21 and PW22 that the first accused represented APSB.

[88] Exhibit P18, the announcement by stock exchange of Malaysia is a very important piece of evidence. Exhibit P18 very clearly state that the first accused had a deemed interest in Multicode through APSB. The first accused agreed that he was aware of the stock exchange C announcement having been made. When confronted with exh. P18, the first accused became evasive and was at a lost of words and his evidence was inconsistent. During the initial cross-examination, the first accused stated that what was announced in exh. P18 was true that he had a deemed interest in Multicode through APSB. However when the D first accused was questioned further as to whether he had purchased the 11.1 million shares in Multicode, he changed his position by saying that it was APSB which bought the shares. In any event, he could offer no explanation as to why he allowed the announcement in exh. P18 to be made which clearly linked him to APSB. He merely said that the E announcement was not correct and he agreed that he made no attempts to correct the announcement that was made to the stock exchange.

EGS Was Sold By The First Accused To Daniel Wong

[89] The first accused in his testimony explained that he has no F involvement with EGS and that he had sold EGS to Daniel Wong on 23 March 2007. The first accused attempted to rely on IDD84 which stated that the resignation of the first accused as the director of EGS took place on 23 March 2007 and that the first accused was no longer a registered shareholder of EGS. The first accused failed to adduce G IDD84 as an exhibit on grounds of documentary hearsay. Nonetheless nowhere in IDD84 is it stated that EGS was sold to Daniel Wong as claimed by the first accused. I attached no weight to IDD84 based on *PP v. Datuk Haji Harun Haji Idris & Ors* [1977] 1 LNS 92 which decided as follows:

H > It is necessary to refer to certain exhibits which have been put in the course of these proceedings for identification but have not in fact been proved as they should have been and are accordingly not exhibits in the strict sense and cannot therefore form part of the record in this case…
>
I > As these two exhibits have not been proved and properly admitted as such, they must in the ultimate analysis be discounted and I shall accordingly disregard references to them and also all oral testimony as well adduced in relation thereto.

[90] It is necessary to appreciate the importance of the first accused's involvement in EGS simply because the monies uplifted from Multicode were transferred into EGS's account maintained at Ambank, Kuala Lumpur and were subsequently used to pay for the 11.1 million shares by transferring the monies to Kenanga on 27 March 2007. The evidence before me overwhelmingly show that EGS is a company controlled by the first accused and this is evidenced by the fact that he is the sole authorised signatory of EGS's bank account at Ambank (see exh. P68). The first accused has also admitted that even after 23 March 2007, he was still the sole authorised signatory for EGS and he still has the authority to sign. The evidence of Anthony Liew ("PW24") an officer at AmBank, confirmed that the arrangements and instructions for the transfer of funds from EGS account to Kenanga were handled by the first accused further fortifies the fact that EGS is a company controlled by the first accused.

[91] Accordingly I am of the opinion that the first accused's claim that Daniel Wong had asked him to pre-sign all the cheques under EGS' name is a bare denial. On the weight to be attach to a bare denial in *PP v. Ling Tee Huah* [1980] 1 LNS 212, it was held that "a mere denial without other proof to reasonably dislodge the prosecution's evidence is not sufficient". The first accused was well aware that Multicode's monies were used to pay Kenanga for the purchase of shares. The defence raised by first accused that he was not aware that Multicode's monies were used to pay for the purchase of Multicode's shares was illogical and a bare denial. In any event, all the instructions pertaining to the payment made to Kenanga were given by the first accused and not Daniel Wong.

The Handover Was Discussed At The BOD Meeting On 23 March 2007

[92] The first accused testified that he had never called PW6 to insist on the handover of Multicode as the handover had already been discussed and agreed upon during the BOD's meeting on 23 March 2007.

[93] To my mind this issue that the handover was discussed during the BOD meeting held on 23 March 2007 was completely an afterthought on the part of the first accused. It was raised for the first time during the defence stage. It was never suggested during the examination of prosecution witnesses including PW1, PW6 and PW10 who attended the BOD meeting on 23 March 2007. This issue is also not minuted in exh. P6. As such, the defence raised by the first accused is clearly an afterthought.

[94] In any event according to PW6 soon after the 23 March 2007 BOD's meeting the first accused called him and informed PW6 that since he has been appointed as the CEO of Multicode, he wanted to have the handover as soon as possible. According to PW6, the first accused wanted the handover to be held on 25 March 2007. However SP6 informed the first accused that it was impossible to have the handover on 25 March 2007 as it fell on a Sunday. The first accused then informed PW6 that he wanted to have the handover on 26 March 2007 at Multicode's main office in Johor Bahru. The evidence of PW6 is corroborated by PW1 who testified that on 24 March 2007 PW6 informed him that the first accused wanted the handover on 26 March 2007.

There Was An Agreement Which Authorised The First Accused To Uplift The FDs

[95] The first accused claimed that there was an agreement signed and one of the terms stipulated in the agreement was that all the FDs held by Multicode were to be uplifted. However the first accused is unable to produce the agreement because it is now being held in trust outside of Malaysia.

[96] PW1 on the other hand very clearly testified that there was no such agreement signed between him and the first accused which allowed the first accused to uplift the FDs. PW1 was cross-examined extensively on this issue and his evidence remained consistent and unshaken. I find PW1 to be a truthful witness and have no reason to disbelieve him. In any event it is only the BOD who could authorise the upliftment of the FDs and not PW1.

Daniel Wong Played A Role In The Purchase Of The 11.1 Million Shares And The Upliftment Of The FDs

[97] Both the accused attempted to place the entire blame on Daniel Wong. The first accused claimed that it was Daniel Wong who made the arrangements for the first accused's entry into Multicode. It was Daniel Wong who got both the accused appointed as directors, it was Daniel Wong who was at the handover meeting on 26 March 2007 and accompanied both the accused to the banks and offered explanations to the bank officers as to the need to uplift the FDs, it was Daniel Wong who filled up the banking forms, EGS was sold to Daniel Wong, it was Daniel Wong who arranged for APSB, it was Daniel Wong who made the investments using Multicode's monies in entities known as Westcape, Credit Suisse and Clariden Leu and it was Daniel Wong who provided the forged RHB FDs certificates to the directors of Multicode.

[98] The learned DPP rightly argued that the first accused cannot deny his own role in his entry into Multicode. There is clear evidence from PW1, PW6, PW21, PW22 and PW24 that the first accused had clearly explained his proposed involvement in Multicode. PW1 testified that when he met the first accused during the lunch meeting at the Zone Hotel, it was the first accused who had introduced Daniel Wong as his partner. The first accused had also said to PW1 that he was a fund manager and had parked his money in Malaysia and he was interested to buy Multicode's shares. PW1's evidence on the Zone Hotel episode was corroborated by PW6. PW21 testified that when he met the first accused at his office, the first accused expressed his intention to purchase Multicode's shares and that he was interested in managing Multicode after purchasing Multicode's shares through APSB.

[99] Both the accused testified that Daniel Wong came into the BOD meeting held on 23 March 2007 and participated in the meeting. This is obviously an afterthought as this evidence was never suggested to any of the prosecution's witnesses during the prosecution's case (see *Shahril Yahya v. PP* [2011] 1 CLJ 1034 on the defence of afterthought).

[100] PW22 testified that when he met the first accused, the first accused told him that APSB will be used as a vehicle to purchase Multicode's shares and what he wanted to do with Multicode after he takes over the company. PW24 testified that the first accused had asked him to issue exh. P62, (the letter to Kenanga) pertaining to the first accused's intention to buy shares in Multicode. The first accused had also issued exh. P69 instructing AmBank to transfer RM17,552,275.20 to Kenanga on 27 March 2007. The first accused also mentioned in exh. P69 that they had made arrangements to remit RM17,552,275.20 into EGS' account and upon the remittances of RM17,552,275.20, PW24 was instructed to transfer the amount to Kenanga for the purchase of Multicode's shares. The first accused admitted making such instruction to PW24.

[101] The evidence of the bank officers (PW12 to PW18) described the first accused's involvement in the upliftment of the FDs. Unlike Daniel Wong there is no doubt that both the accused were in a position to be able to effect the upliftment of the FDs as they were the directors and authorised signatories of Multicode.

[102] On the testimony of the first accused that it was Daniel Wong who had made the arrangements for Multicode's monies to be invested with offshore entities such as Clariden Leu and Westcape there is no evidence to show that Daniel Wong had instructed him to do so. On the other hand the evidence shows that it was the first accused who had represented to the BOD that the monies were placed with certain investment bodies, among which is Westcape Investment Limited.

[103] The evidence shows that both the accused were fully aware that the FDs were uplifted and transferred to third parties accounts but they never disclosed this fact when they was asked by the BOD of Multicode and the external auditors. Instead, the first accused even misled the BOD that he will provide the evidence and credit the monies back into Multicode's account which never happened. PW4 had sought clarification from the first accused on the upliftment of the FDs but was misled by the first accused that the monies were placed with Credit Suisse when in fact he knew that the monies had already been transferred to the third parties.

[104] According to PW26, an external auditor, when he confronted the first accused about the missing FDs, the first accused said that he will provide the evidence during the BOD meetings which he never did. The first accused had even promised the BOD to refund all the monies back into Multicode's account. Nevertheless, the monies were never credited into Multicode's accounts resulting in the external auditors issuing a qualified opinion on Multicode's accounts. PW26's evidence is supported by PW9's evidence.

[105] Having appreciated the evidence as a whole I am of the opinion that it was not Daniel Wong but the first accused who was the mastermind of the whole scandal and who had actively participated in deceiving the BOD and defrauding Multicode.

Second Accused Did Not Benefit From The Whole Transaction

[106] It was the submission of the learned counsel for the second accused that the second accused did not receive a single cent from the upliftment of the FDs. The second accused also had no knowledge of the purported investments with Westcape and Clariden Leu.

[107] The learned DPP submitted that the second accused is charged of having abetted the first accused to engage in an act which operated as a fraud on Multicode by causing the uplifting of the FDs and in the alternative of committing criminal breach of trust against Multicode and therefore there is no requirement to show that the second accused had benefitted from the transaction. The case of *Sivananda Mudali v. Emperor* AIR 1926 Mad 1702 is relevant where the court pointed out as follows:

> ..The intention to defraud need not necessarily be to obtain something to which a person is not legally or equitably entitled. It is sufficient if by means of the perpetration of the fraud somebody is defrauded…

[108] I agree that there is no requirement for the prosecution to show that the second accused benefited from the transaction. It is clear that by virtue of the actions of both the accused, Multicode was defrauded by the loss of the monies in its FDs that were uplifted and transferred

to third parties. It is therefore immaterial whether the second accused had benefited from the monies which were uplifted. For the offence under s. 409 of the Penal Code causing wrongful loss is sufficient. In this case there is ample undisputable evidence that Multicode suffered a loss of over RM26 million as a result of the dishonest conduct of both the accused.

That The Second Accused Was Merely Negligent In The Exercise Of His Functions

[109] The learned counsel for the second accused submitted that the second accused at the worst may have been negligent in the exercise of his functions and this does not amount to a criminal offence. I am fully aware that mere negligence cannot be equated to criminal dishonesty as seen in the case of *Tan Liang Chew & Ors v. PP* [1996] 1 LNS 118.

[110] In the present case however, both the accused had in their defence insisted that they had not only been authorised to uplift the FDs but had informed the 29 March 2007 BOD's meeting that they had uplifted the FDs. Unlike the case in *Tan Liang Chew* where a mere oversight amounted to negligence in the present case the second accused had positively taken the position that he was authorised to upliftment the FDs. As such the issue of oversight or negligence does not arise since the second accused's action was a calculated act.

[111] In any event the weight of the evidence adduced by the prosecution overwhelmingly show that the conduct of both the accused in carrying out the upliftment of the FDs is actuated clearly and unambiguously by a dishonest intention and not mere negligence.

Absence Of Woo Chee Loong

[112] The learned counsel for the first accused submitted that the prosecution's failure to call Woo Chee Loong as a witness is fatal as he is the party who purportedly negotiated the sale of PW1's shares. The prosecution submitted that whether Woo brokered the deal or not does not change the fact that the first accused played the role which he did in uplifting the FDs of Multicode while he was a director of the company and had used that money for the settlement of his purchase of Multicode shares. The prosecution in short submitted that there is no gap in the case of the prosecution. I agree with the prosecution that the prosecution has established all the ingredients of the offence and there is no gap in the prosecution's case.

A **Conclusion On The Defence**

[113] In the ultimate analysis, I am of the opinion that the defence raised by both the accused is a defence of bare denials, afterthought and recent fabrications. In particular I found the first accused to be manufacturing his evidence as he went along with his testimony including the cross-examination. The first accused left me an impression of that of a very intelligent but arrogant, kiasu and deceitful witness where he even went to the extent of testifying that PW1 should have been charged instead of him.

[114] The crux of the defence was that the BOD of Multicode had authorised both the accused to uplift the FDs during the BOD's meeting held on 23 March 2007. On this aspect I found both the accused as untruthful witnesses. It is so obvious that this so called alleged discussion did not take place and is therefore not recorded or minuted anywhere in exh. P6. Nowhere in exh. P6 does it state that the BOD had authorised both the accused to uplift the FDs. It cannot be denied that upliftment of FDs is a very important matter as the monies involved was very substantial and had the authorisation of upliftment been discussed it would have been recorded in exh. P6. PW6, PW7 and PW10 on the other hand have clearly testified that there was no such discussion or approval by the BOD for the upliftment of the FDs. I accept PW6, PW7 and PW10 as truthful witnesses as they have no reason to lie in this court. As for the evidence of the defence witness DW3, I personally caught him cheating right under my eyes, that is, he was reading out answers to the questions posed to him by the learned defence counsel from a prepared text. I attach no weight to his evidence. He is to my mind a wholly unreliable and uncredible witness and was produced by the defence merely to boost the defence, regardless of whether it is true or not, that there was such a discussion to uplift the FDs. I reject his evidence as he is not worthy of credit.

[115] It is therefore my finding that the upliftment of the FDs was never discussed at the BOD's meeting dated 23 March 2007 and neither was there any approval given by the BOD for such upliftment of the FDs. In any event the subsequent BOD's meeting of 29 March 2007 and 27 June 2007 again did not rectify exh. P6 regarding the upliftment of the FDs.

[116] After a careful evaluation of all the evidence in this case, I had asked myself if the defence had raised any reasonable doubt in the case for the prosecution. I found that both the accused had failed to raise any reasonable doubt. On the other hand I was satisfied that the prosecution had succeeded in proving the alternative charge for criminal breach of trust, an offence under s. 409 of the Penal Code against the first and the second accused beyond all reasonable doubt. I am of the

opinion that the evidence as a whole overwhelmingly pointed to an offence under s. 409 of the Penal Code though the elements for the offence under s. 87A(b) of the SIA were made out. Accordingly I found both the accused guilty of the alternative charge for an offence under s. 409 of the Penal Code and they were consequently convicted.

Sentence

[117] Before passing sentence I had considered carefully the mitigation of both the accused. The first accused very briefly mitigated as follows:

(a) did not benefit from the monies withdrawn from the FDs;

(b) it was mere act of stupidity or sheer negligence to sign off upliftment of FDs;

(c) mere misfortune that the first bank demanded his physical presence for the upliftment of the FDs;

(d) any role to defraud if any, he's merely a pawn used by Daniel Wong;

(e) aged 59 years old;

(f) is a first offender;

(g) stricken by colon cancer and undergoing cancer treatment which is taking a financial toll on him;

(h) unemployed since he left Multicode in 2008;

(i) lifelong reputation as banker has been tarnished; and

(j) remorseful of his conduct.

[118] The second accused pleaded as follows:

(a) has shown remorse and has been sufficiently punished;

(b) had claimed trial because his representations to the Securities Commission were rejected;

(c) the protracted proceedings had taken a toll on his frail health. He had suffered from irregular heartbeat and hypertension in the course of the trial and whilst waiting for the outcome of the trial, he was stricken with a heart attack with cardiac failure and had to be admitted to KL Pantai Hospital for a coronary angioplasty and stenting on 26 July 2011. His health would warrant constant monitoring and regular medication if not actual hospitalisation especially his impending follow up operation on 4 October 2012;

A (d) has a clean record with sterling contributions to society;

(e) is a first offender;

(f) is an old man of 67 years of age;

B (g) the charges looming over the accused's head these two years had caused him to reflect upon his previous actions and he has shown remorse and regret in not having acted more carefully and with greater circumspection in hindsight;

C (h) he had suffered a blemished reputation and the stigma of the ongoing prosecution;

(i) a record of criminal conviction would hamper his livelihood and business opportunities. It would disqualify him from continuing to hold any directorship in any Malaysian companies and would cause D him to relinquish his various corporate positions resulting in loss;

(j) urge a reasonable sentence of fine only;

(k) affected his family ties with his wife and children;

E (l) had not profited in any way and the facts would show that he did not receive any part of whatever fund remittance;

(m) it was the first accused and/or Daniel Wong who were the main perpetrators and who manipulated the second accused in the scheme of things hatched by him or them;

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(n) regrets having been unwittingly drawn into the first accused and/or Daniel Wong's grand scheme or intricate web;

(o) based on the existing judicial precedents and sentencing trend urged G a non-custodial sentence be imposed and that the quantum of any fine to be imposed be a reasonable sum in view of his deteriorating financial position and also that all his available financial resources have been frozen in the related civil proceedings brought against the second accused;

H (p) to consider his hard and long road of his early years leading to the present day achievements which include his various contributions to the national economy and the various social and political organisations in which he held various positions;

I (q) throws himself at the mercy of this court to temper justice with mercy bearing in mind that his derelictions, if any, were more in the nature of recklessness or negligence but not intentional or gross dishonesty;

(r) if the court is minded to impose a substantial fine then payment by instalments over a period of time be allowed;

(s) a sentence of fine only be imposed in this case notwithstanding the use of the phrase "shall be punished with imprisonment" based on the Supreme Court case of *PP v. Mohamed Nor & Ors* [1985] 1 LNS 25 and even if imprisonment were warranted, to consider the exceptional term of one day's imprisonment only plus a substantial but reasonable fine in addition; and

(t) whipping is inapplicable to him by virtue of his old age which is well in excess of 50 years of age.

[119] I had also considered the lengthy reply by the learned DPP who had urged an imprisonment sentence be imposed based on the aggravating factors and to give paramount consideration to the public interest factor due to the seriousness of the offence and the implications to the investors and the economy. The learned DPP emphasised on the deterrent factor and urged to take into consideration that this was a premeditated offence, the background and experience of both the accused persons.

[120] To my mind the offence committed by both the accused is a very serious offence. This can be seen in s. 409 of Penal Code which provides that a person who is convicted for an offence under s. 409 of Penal Code is liable to imprisonment for a term which shall not be less than two years and not more than 20 years and with whipping, and shall also be liable to fine. The public interest factor is reflected by the various amendments that has been made to s. 409 of the Penal Code from time to time.

[121] I agree with the learned DPP that the public interest factor is a factor that should be given paramount consideration. In the case of *PP v. Govindnan Chinden Nair* [1998] 2 CLJ 370, it was held as follows:

> In deciding the appropriate sentence, a court should always be guided by certain considerations. The first and foremost is the public interest. The criminal law is publicly enforced, not only with the object of punishing crime, but also in the hope of preventing it. A proper sentence, passed in public, serves the public interest in two ways. It may deter others who might be tempted to try crime as seeming to offer easy money on the supposition that if the offender is caught and brought to justice, the punishment will be negligible. Such a sentence may also deter the particular criminal from committing crime again, or induce him to turn from a criminal to an honest life. The public interest is indeed served, and best served, if the offender is induced to turn from criminal ways to honest living.
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> ...

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> Thus in sentencing generally, the public interest must necessarily be one of prime consideration. A major element of public interest is that justice not only to the accused but also to society. Accordingly, in passing sentence, a court has to consider not only the offence and the offender, but also the interest of society.

B **[122]** In the case of *PP v. Khairuddin Hj Musa* [1981] CLJ 86; [1981] CLJ (Rep) 234, it was held that public interest factor should be taken into consideration when deciding the quantum of the sentences. The relevant part reads:

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> Public interest demands that cases of this nature involving persons in positions of trust, particularly in financial institutions, must be dealt with severely, in the hope that would-be offenders would be deterred. Until it is understood by such people that normal punishment for helping themselves to their employers' money is to be sent to prison, there will continue to be officials in commercial and co-operative banks and similar institutions, prepared to pilfer the till.

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> …

> The number of people placed in the position of trust has been growing steadily and rapidly both in the private and public sectors with corresponding increase in opportunities for such people to make easy money by dishonest means. In my view, the court would be failing in its duty if it does not consider CBT by a servant in the private sector just as serious as a CBT by a public servant. As was held in *R v. Pugh & Rendell*: "…dishonesty by persons in positions of trust was all too common, and the only way to stop it was by custodial sentences. Offenders in this class of case had ample funds from which to pay fines, and would regard being fined as one of the risks of the business".

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[123] I am fully mindful that both the accused were the directors of Multicode, a public listed company and they were also the authorised signatories of Multicode's account. They were persons in position of trust. They had violated the trust by siphoning out Multicode's funds to third parties' account without the authorisation and knowledge of Multicode's BOD. The monies were then used to purchase 11.1 million units of Multicode's shares. Public interest therefore requires that the accused persons should receive a punishment which will not only fit his crime but will also act as a deterrent to other persons who may be similarly influenced by greed and fraud. In *PP v. Khairuddin Hj Musa* [1981] CLJ 86; [1981] CLJ (Rep) 234, it was pointed out that public interest demands that cases of this nature involving persons in positions of trust, must be dealt with severely, in the hope that would be offenders would be deterred.

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[124] I fully agree with the prosecution that the commercial market place must be protected from the likes of the accused persons. The case of *PP v. Tan Koon Swan* [1986] 2 CLJ 379; [1986] CLJ (Rep) 841 is illustrative.

[125] Since Multicode is a public listed company, its shares are owned by the public at large and traded freely in the stock exchange therefore, when both the accused committed the crime, not only was the company affected, but it has also effected the confidence of the investors and public at large who had invested into the company.

[126] As to the damage inflicted on Multicode it is obvious that both the accused had defrauded Multicode by siphoning out Multicode's monies to third parties and as a result had caused Multicode to lose its monies. To date, Multicode has not been able to recover those monies. The actions of both the accused persons have resulted in a total loss of RM26,045,473.94.

[127] What is utmost shocking is that the first accused had in fact used Multicode's own monies to purchase Multicode's shares. The first accused had acquired 11.1 million Multicode's shares, not using his own funds, but by using Multicode's funds without the knowledge and authorisation of Multicode's BOD.

[128] I have no hesitation in agreeing with the learned DPP that in sentencing both the accused the court must take into account that if a mere fine is imposed in a case of such magnitude as this, where large sums of monies from the public listed company were withdrawn by its own directors who were in the position of trust, this would certainly give an impression that defrauding a public listed company is not a serious offence where one could get away with the offence by merely paying the fine.

[129] In passing sentence I gave much consideration to the fact that a premeditated offence demands a deterrent sentence. In the case of *PP v. Loo Chang Hock* [1988] 1 CLJ 76; [1988] 2 CLJ (Rep) 263, it was held that where offences were committed deliberately and with professional skill and not done on the spur of the moment a deterrent sentence is appropriate. The facts of the case clearly disclose that the offence was not committed at the spur of the moment but a premeditated one which required planning and execution on the part of both the accused persons. I have also given serious consideration to the roles played by the first accused, who was basically the mastermind of this huge scandal and the lesser role played by the second accused. The sentence imposed against the first accused must therefore necessarily be more severe then that against the second accused.

[130] On the issue of good character of the accused the case of *R v. Adler* [2005] NSWSC 274 is instructive where it was held:

> … it has been held that prior good character is of lesser significance in the case of white collar crimes because it is that factor which places offender in a position where he or she is able to commit such crime.

[131] The learned DPP also referred to the case of *Securities and Futures Commission v. Choi Wai Zak & Anor* [2003] 1 HKC 30 in which it was held:

> … the existence of a clear record in a sufficiently serious case could never of itself be sufficient to save a person from an immediate sentence of imprisonment. Market manipulation was a serious offence and the judge was aware of the trend of the increase of the crime …
>
> …
>
> … Each (Defendants) has a clear record. I pause here to comment that it is a well-known in the majority of fraud cases, such as this is, that the offenders often are of the previous good character. Financial houses are unlikely to employ people with criminal records …

[132] Having the benefit of the *Adler* and *Choi Wai Zak*'s cases I am of the opinion that factors such as good character, old age, frail health, being first offenders, are remorseful and regretful of their actions should not be strong mitigation factors and should therefore not be given serious consideration when imposing the sentence. It is trite law that white collar criminals could not rely on the mitigating factor of good behaviour simply because had they been persons of bad character they are not qualified to be placed in such positions of trust.

[133] Serious consideration was given to the fact that both the accused had actively participated in the decision making process of Multicode. The evidence adduced clearly showed that they were involved with the whole transaction starting from uplifting Multicode's funds and transferring the same to third parties' account. Both the accused had misused their position as directors and the high expectations placed on them. Being the directors of a public listed company they owe greater responsibilities towards the company as compared to other general employees of the company.

[134] I also took into consideration that both the accused are no simpletons. The evidence adduced showed that both the accused had vast knowledge and experience in corporate matters. The first accused had during his testimony proudly beamed of his string of qualifications and job experiences. The second accused holds directorship in a string of companies. Sadly both the accused had exploited their vast knowledge and experience to defraud Multicode.

[135] On the complexity and voluminous of the case I am fully aware that this case has taken more than two years to reach this stage. Both the accused are certainly not entitled to the discount accorded to plead guilty cases as both the accused had the benefit of a full blown trial involving 35 witnesses and 83 exhibits. I am fully mindful of the testimony of the investigating officer that the evidence searched and seized in this case is voluminous that is running into boxes. There is no doubt that much time and public funds have been spent by the investigating and prosecuting officers. It was no doubt a tedious and stressful job but which they had performed brilliantly.

[136] I have no doubt whatsoever that this white collar scandal that both the accused had committed is of the highest order and was very meticulously schemed and executed. It was a premeditated white collar scandal executed with precision within the T + 3 days.

[137] As such the sentence imposed on the accused must convey a strong message to offenders and would be offenders that 'crime does not pay'. It is trite that in order for the business and commercial sector to flourish there must be a safe and conducive environment free of white collar crime. Accordingly I shall be failing in my duties if an inadequate sentence is imposed.

[138] Having considered all the mitigating factors put forward by the learned counsels of both the accused persons and the reply by the learned DPP the following sentence was passed:

First accused	:	12 years term of imprisonment and a fine of RM1,000,000 (one million) in default two years term of imprisonment;
Second accused	:	6 years term of imprisonment.